Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1997

HAROLD "SKIP" FINN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
AND APPENDIX

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's constitutional rights are violated by larceny convictions under 18 U.S.C. §666 and 18 U.S.C. §1163 without proof that his actions were without the consent of the owner or without authority?

2. Whether the government's knowing use of inherently incredible testimony and misleading arguments to sustain the convictions herein violated Petitioner's Fifth Amendment right to due process of law?

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HAROLD "SKIP" FINN, Appellant in Case No. 96-3527 in the United States Court of Appeals for the Eighth Circuit, respectfully petitions for writ of certiorari to review the judgement of the United States Court of Appeals affirming Petitioner's convictions entered by the United States District Court) District of Minnesota, Fifth Division.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is attached hereto as Appendix A-1 and is cited as United States v. Pemberton, Brown, and Finn, 121 F.3rd 1157 (8th Cir. 1997). The District Court's Judgement of Conviction is attached as Appendix A-2.

JURISDICTION

The judgement of the United States Court of Appeals for the Eighth Circuit was entered on July 31, 1997. The Petition for Rehearing was denied on September 22, 1997 and is attached hereto as Appendix A-3. This Court's jurisdiction to review the decision below is predicated upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. 18 U.S.C. §666

(a) whoever, if the circumstances described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency...

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

4. 18 U.S.C. §1163

Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or entrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization;

REASON TO GRANT CERTIORARI

Petitioner respectfully requests that the Court exercise its discretion to review the judgement of the Eighth Circuit Court of Appeals. This case of first impression raises an important legal principle with application to the interpretation of many other federal larceny statutes. The decision of the Eighth Circuit conflicts with the Court's teachings in Morissette v. United States, 342 U.S. 246, 96 L.Ed. 288 (1952), Bates v. United States, ___U.S.___, Case. No. 96-7185, 1997 WL 679414 (1997), and United States v. Gaudin, 515 U.S.___132 L.Ed.2d 444 (1995).

The judgement below affirms larceny convictions under 18 U.S.C. §666 and §1163 without any proof that the Leech Lake tribal government did not consent to the property transfers challenged by the government and without requiring

that the jury find that Petitioner acted without the tribal government's consent or its authority in 1990.

STATEMENT OF PROCEEDINGS AND FACT

A. Proceedings Below

Finn, Pemberton and Brown, the co-defendants in this case, are enrolled members of the Leech Lake Band of Chippewa Indians. The Leech Lake Reservation Business Committee (LLRBC), comprised of five elected members, is the federally recognized tribal government of the Leech Lake Reservation in north-central Minnesota. In 1985, Pemberton served as the secretary-treasurer and Brown served as one three LLRBC district representatives. Finn, who served as the secretary-treasurer in the 1970's prior to attending law school, was one of the two attorneys who served as Leech Lake's legal counsel.

In November 1990 shortly after Petitioner was elected as the first Native American to serve in the Minnesota State Senate, Special Agent Hanbury of the Department of Interior-Office of Inspector General (DOI-OIG) initiated an investigation of Reservation Risk Management, Inc. (RRM) and Petitioner's involvement therein. The basis for the investigation was a "suspicion" of a disgruntled tribal political opponent of Finn and Brown. Without any complaint from the LLRBC or any of its staff, Hanbury initiated a grand jury inquiry in December 1990.

Over three and one-half years later, on August 12, 1994, Petitioner was charged by information with one misdemeanor count of misapplication of tribal funds in violation of 18 U.S.C. §1163 relating to an August 1988 reimbursement from the LLRBC to RRM for a payment made to a tribal official. Appendix C. Petitioner entered a conditional guilty plea in

exchange for the U.S. agreeing not to pursue four felony charges related to that transaction. Id. After making its bargain with Petitioner, the government vigorously pursued an obstruction enhancement. At sentencing in March 1995, the court adopted the government's position based upon sworn, but false, testimony of the case agent that the LLRBC had not produced a certain invoice when it was specifically requested by subpoena in May 1993. (Preparing for trial in late 1995, the government "discovered" that a copy of the invoice had in fact been produced by the LLRBC in May 1993). Finn withdrew his plea, and the government then dismissed the information.

On June 7, 1995, the instant indictment was returned. **A one paragraph information became a million dollar fraud described in sixty-eight pages of alleged criminal conduct with twenty-six felonies charged.** The district court's jurisdiction was predicated upon 18 U.S.C. §3231.

Finn, Pemberton and Brown were charged with one count of conspiracy, 18 U.S.C. §371, and, in varying combinations, with nine counts of felony theft of tribal funds, 18 U.S.C. §1163; four counts of theft concerning a program receiving federal funds, 18 U.S.C. §666; one count of bribery concerning a program receiving federal funds, 18 U.S.C. §666; five counts of money laundering, 18 U.S.C. §1957; three counts of mail fraud, 18 U.S.C. §1341, 1346; two counts of making a false statement, 18 U.S.C. §1001; and one count of obstruction of justice, 18 U.S.C. §1503.

After a seventeen day trial and jury deliberations spread over seven days, all three defendants were convicted of conspiracy and Petitioner was convicted of four counts of theft of tribal property and four counts of theft from a program receiving federal funds for the same transactions in June and July 1990, and three counts of mail fraud. Pemberton was also convicted of one count of theft of tribal

property and one count of theft from a program receiving federal funds.

Petitioner's motion for judgements of acquittal and/or a new trial were denied on June 11, 1996. On September 5, 1996, Finn was sentenced to fifty-seven months imprisonment, fined twenty-five thousand dollars ($25,000), and ordered to pay four hundred thousand dollars ($400,000) restitution. Judgement of conviction was entered on September 16, 1996. Appendix A-2. Petitioner's appeal to the Eighth Circuit Court of Appeals was denied on July 31, 1997, Appendix A-1, and his motion for rehearing was denied on September 22, 1997. Appendix A- 3.

B. Fact Statement-General

In 1985, for the second consecutive year the LLRBC received a quote for its general liability, property and worker's compensation insurance which was dramatically higher than the previous year's cost. Due to problems in the reinsurance market, the only quote received for property coverage was more than double the previous year's cost ($121,810 to $254,448) and the general liability quote was six times higher ($30,662 to $186,661). Ten other companies refused to offer coverage at any cost. Gov.Ex. 5.

In response to these excessive increases, the financially strapped LLRBC initiated a study of alternatives. The LLRBC's solution to the problem evolved over several months. (Tr. 2579) Former tribal chairman White recalled numerous private discussions with staff, the LLRBC's insurance consultant, and Petitioner as well as several public meetings at which the matter was discussed. (Tr. 743, 753, 769-71, 778, 784) He also recalled that there were two of three LLRBC "executive sessions" where the LLRBC and Petitioner discussed the matter with no staff present. (Tr. 775) Seventy-one year old White's decade old trial memory of

specific meetings and critical details of the plan was understandably vague. (Tr. 760-65, 775-76, 784-85, 787-88, 826-32) when pressed for details of specific meetings, White responded: "There were so many. You know, this insurance thing was just a chaos, I don't exactly remember what dates that you are specifically questioning. (Tr. 775-76) Former LLRBC member Michaud's memory was also very vague. (Tr. 985, 995-95, 1021-25)

The details of the LLRBC's original self insurance plan were set out in a memo on August 16, 1985. Gov.Ex. 6; Appendix E. The plan included the purchase of general liability insurance as the LLRBC was required to carry such coverage by its various federal and state grants, (Tr. 2028), as well as automobile liability coverage and fire coverage for several buildings with the LLRBC self insuring the balance of its risks.

Considering it "akin to taking the chaff without the wheat," the only carrier to provide a quote to Leech Lake then refused to sell the LLRBC liability coverage unless the Reservation also purchased the property coverage quoted. (Tr. 217) Consequently, Leech Lake went "bare" for several months.

With the start of a new fiscal year, the LLRBC chartered Reservation Risk Management, Inc. (RRM) on October 1, 1985 "to establish and operate" the LLRBC's "modified self-insurance" plan. This plan was essentially the same as that implemented by the August 16, 1985 Memo except RRM was created to provide "affordable" insurance to the Reservation. (Tr. 783) The Charter granted to RRM by the LLRBC provided: "Shares of stock may only be held by the Leech Lake Reservation Business Committee or members of the Leech Lake Band of Chippewa Indians." Gov.Ex. 7 & 8 (Appendix F).

The insurance coverage to be provided by RRM was explained by Petitioner at an October 29, 1985 public meeting

at which the LLRBC unanimously authorized "the Chairman and Secretary/Treasurer to enter into and negotiate on behalf of the Leech Lake Reservation with" RRM. Gov.Ex.9.

The LLRBC and Petitioner executed the Subscription Agreement on November 5, 1985, Gov.Ex 10 (Appendix G-1), and on behalf of RRM, Petitioner simultaneously executed an Insurance Binder which set out the coverage provided by RRM. **INDICTMENT**, pg.9, para.8/9. Other details of the agreement were contained in the Shareholder's Agreement between Petitioner and the LLRBC, Gov.Ex. 15 (Appendix G-2), and the Insurance Agreement between the LLRBC and RRM, Gov.Ex. 14 (Appendix G-3), which were executed by the on January 14, 1986. On January 28, 1986 the LLRBC made its first partial premium payment to RRM.

The funds flow chart presented to the LLRBC set out the annual premiums, the costs of RRM's operation, and the build-up of the reserves. Finn Ex. 2 (Appendix J). Because commercial stop-loss insurance was not available (Tr.242-43,247), Petitioner and his law partner pledged to provide RRM with $450,000 to cover any claims or property losses which exceeded the reserves. Gov.Ex. 12.

To prevent Petitioner from raiding the reserves or simply withdrawing from the Agreement, the Shareholders' Agreement provided: "The reserves in Fund C shall belong to the shareholders of RRM and cannot be distributed unless the parties mutually agree to modification of this agreement or dissolution of RRM." The Shareholder's Agreement also contained a forfeiture clause to deter the LLRBC from early termination of the plan before sufficient reserves were accumulated. To further protect LLRBC, the Insurance Agreement obligated RRM to maintain the insurance for ten years if the LLRBC made its premium payments.

Pursuant to the Shareholders' Agreement, the LLRBC appointed Brown and Pemberton as its two representatives to the RRM Board on January 20, 1987. Pemberton Ex. 8.

Shortly after that, Brown and Pemberton made an investment in RRM through Finn. In December 1988, the LLRBC obtained Bureau of Indian Affairs (BIA) approval for expenditures of federal funds paid to RRM for insurance. Gov.Ex. 426-28 The LLRBC represented to its independent CPA that RRM was a privately owned unregulated insurance company which provided liability insurance to the LLRBC at reasonable rates and administered the LLRBC's 1986 self-funded workers' compensation plan at a competitive fee. Gov.EX. 178 (Appendix H).

In November 1989 a carrier licensed by the State of Minnesota bound coverage for Leech Lake. The LLRBC accepted the benefits of the coverage and expressed no dissatisfaction or objection during the four years RRM operated. On March 29, 1990, the LLRBC unanimously approved a superseding contract with RRM retroactive to October 1, 1989 to continue the risk management and insurance related services that Petitioner had provided under the original Insurance Agreement from 1985 to 1989. Gov.Ex. 288 (Appendix I). All known liability and 1986 worker's compensation claims were resolved; the LLRBC incurred no property losses during RRM's operation.

The LLRBC received almost $900,000 in cash, property and payments on its behalf from RRM between October 1989 and June 1990, Finn Ex. 41, which represented more than one hundred per cent of the reserve fund that had been projected to be accumulated in the first four years and approximately sixty percent of the assets then held by RRM. Finn Ex. 2 (Appendix J). The defendants and Petitioner's former law partner received approximately $655,000 of RRM assets during this time. Id.

No LLRBC member or staff member testified to any dissatisfaction with RRM's operation or the distribution of its assets. Former LLRBC member Michaud, who had served when RRM was established and during the time period RRM

was dissolved, was not even asked if he or the LLRBC had any objection to the 1990 dissolution of RRM and the distribution of its assets.

C. Fact Statement-Hartley White

On March 11, 1992, former tribal chairman Hartley White was interviewed by Special DOI-OIG Agent Hanbury. Appendix B. White, who had not served on the LLRBC since his June 1988 defeat for reelection by Defendant Dan Brown, told Hanbury that the only discussion of RRM which he could recall had occurred in 1985 when RRM was established to provide insurance to the LLRBC; that tribal members could invest in RRM and those who did would share in any funds left at dissolution of RRM. White reaffirmed the truth of these facts at trial. (Tr. 686-87, 790-91, 865) White also told Hanbury that "the law firm of Finn and Mattson was to be the major beneficiary of any funds remaining when RRM dissolved." White unequivocally reaffirmed this exculpatory fact several times at trial. (Tr. 686-87, 788, 790-92, 850-51, 865)

While affirming the truth of these exculpatory facts at trial, White also testified that he did not recall that Finn was going to be the majority owner of RRM and asserted that all remaining funds were to be returned to the LLRBC. White volunteered that he understood RRM to be an insurance company: "I...thought it would be pretty nice to have two guys watchdogging our interest in the insurance company." (Tr.832-33)

Former LLRBC member Michaud testified that individual ownership of RRM was contemplated by the LLRBC when RRM was chartered in 1985: "Q: Were you offered an opportunity, at any time to invest in Reservation Risk Management? A: At one time we were told that we could buy into it." (Tr. 899, see also 993, 1033) Former LLRBC

employee McCarthy also recalled that individual ownership of RRM was possible and testified that his personal effort to buy into RRM was denied because the Charter did not allow non-Band members to hold shares. (Tr. 208) No other former or current LLRBC member or employee testified.

White admitted signing the Subscription Agreement (Tr. 695, 767), the Articles for RRM (Tr. 760-61, 765), the Shareholder's Agreement (Tr. 703), and the Insurance Agreement. (Tr. 698, 797) The handwriting analysis conducted by the Minnesota Bureau of Criminal Apprehension expert established that White had indeed signed these four key documents. (Tr. 1563-68) While White questioned the signatures over his name affixed to LLRBC Res. 86-26 and the information letter informing Finn of the LLRBC's January 20, 1987 appointment of Pemberton and Brown to RRM's Board of Directors, White testified that LLRBC staff members often signed numerous documents on his behalf. (Tr. 795)

Expert witnesses called by the government and defense gave conflicting interpretations of the plan documents and the reasonableness of the terms.

I.(a) Sections 666 and 1163 codify common law larceny offenses. Proof that the owner of the property did not consent to the defendant's act is essential to conviction under both statutes.

The Eighth Circuit determined that "the government's theory of the case, a theory the evidence supports, was that the documents purportedly signed by White...were fraudulently procured, and therefore that the defendants never had a legitimate claim to the money." Appendix A-1, pg. A-11. Because the documents executed in November 1985 and January 1986 were deemed void, the court, without discussion, then concluded that Petitioner's distribution of

RRM property in June and July 1990 constituted conversion under 18 U.S.C. Sections 666 and 1163. Id., pg. A-11.

The court ignored Petitioner's argument (in his original brief and restated in both his reply brief and petition for rehearing) that the record did not establish that the LLRBC objected to Petitioner's 1990 acts which the government charged as larceny. Even assuming that the LLRBC had not "assented to Finn's ownership" at RRM's inception, the government's theory of the case as adopted by the Eighth Circuit is fatally flawed: it assumes that the original RRM document provided the only explanation for the 1990 property transfers. Petitioner and his codefendants did not testify, and Petitioner neither conceded nor stipulated that the November 1985 and January 1986 documents were the sole authority for his 1990 acts which underlie the Section 666 and Section 1163 charges. The record contains no evidence to establish that the LLRBC, which has exclusive authority to manage tribal property, objected to either Petitioner's handling of RRM from 1986 to 1990 or the distribution of RRM assets in 1990. Without such proof the record fails to establish that Petitioner's actions in 1990 were taken without permission of the LLRBC or were without authority. Other lawful explanations such as a modified or subsequent agreement of the LLRBC and Petitioner in settlement of RRM or a dispute, as payment for Petitioner's services and guarantee to RRM, or as payment for other services, a bonus, gift or loan. When the government rested and when the case went to the jury, Petitioner was entitled to judgement of acquittal as no rational trier of fact could have found each element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979).

The record does establish that the LLRBC received almost $900,000 (approximately sixty per cent) of RRM's assets between October 1989 and May 1990, despite the forfeiture clause of the Shareholder's Agreement, Gov.Ex. 15

(Appendix G-2), and the LLRBC's minority ownership under the Subscription Agreement. Gov.Ex. 10 (Appendix G-1). These facts refute the Eighth Circuit's assumption that the original documents were the only possible basis for the 1990 distribution of RRM property.

The LLRBC unanimously approved a superseding contract with RRM on March 29, 1990 to continue the various insurance related services that Petitioner had provided for four years under the original documents deemed void by the court. Gov.Ex. 288 (Appendix I). Under Minnesota contract law, a party may waive a contract fraud or lose the right to raise it by acquiescence or by merger in a subsequent contract. Proulx v. Hirsch Bros., Inc., 155 N.W.2d 907, 912 (Minn. 1968); Carpenter v. Vreeman, 409 N.W.2d 258 (Minn.App. 1987). The record does not support either the court's conclusion that Petitioner had no legitimate claim to the funds and property he received in 1990 or a jury finding that his actions in dissolving RRM were without the consent of the LLRBC.

Common law larceny offenses require proof that the accused acted without permission/consent of the owner or without authority. The essence of common law larceny is a **wrongful taking**, i.e. against the wishes of the owner. If Sections 666 and 1163 codify common law larceny, Petitioner's conviction violates his Fifth Amendment right to due process and his Sixth Amendment right to a jury trial.

Sections 666 and 1163 are patterned after 18 U.S.C. §641 which criminalizes the wrongful taking of government property. The offenses included in each section are similar to those of Section 641 with only slight variations. The Sixth Circuit found that Section 666's legislative history indicated that the statute was intended to augment the reach of the Section 641 theft offenses. United States v. Sanderson, 966 F.2d 184 (1995). The Court has previously determined that Congress intended to codify the common law in enacting

Section 641. Morissette v. United States, 342 U.S. 246, 272-73, 96 L.Ed. 288 (1952).

Congress was surely cognizant of the principles of statutory construction set out in Morissette v. United States when it enacted Sections 666 and 1163: "We should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute...where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice...absence of contrary direction may be taken as satisfaction with widely accepted definitions...." 342 U.S. at 263, 97 S.Ct. at 250.

Citing an English codification of larceny offenses which defined "to steal" as the a taking "without the consent of the owner" and a New York codification which required a finding that the accused "wrongfully take" the property of another, the Court concluded that the "conversion" criminalized by Section 641 is "the intentional and knowing abuses and unauthorized uses of government property...." (emphasis added) Morissette, 342 U.S. at 272, 97 S.Ct. at 254. The Court held that the Section 641 offenses required "not only a wrongful act, but a criminal intention. Under our system...both must be found by the jury to justify a conviction...." (emphasis added) 342 U.S. at 274, 97 S.Ct. at 255.

Cases arising under Section 641 and similar federal larceny statutes have generally required proof of both criminal intent and that the challenged act was without authority or without permission of the owner. In United States v. Barlow, 470 F.2d 1245, 1251 (U.S.C.A.D.C. 1972), the court stated that a Section 641 offense "is basically the common law crime of larceny. This crime requires a wrongful taking...with fraudulent intent to deprive the owner of his property without his consent." (emphasis added) Sitting en banc, the Eleventh Circuit held that a Section 641 offense required proof that the offender acted without authority. United States v. McRee, 7

F.3rd 976, 980 (1993), cert. den. 114 S.Ct. 2710, 128 L.Ed.2d 368. In a case arising under 18 U.S.C. §661 (maritime theft), the Third Circuit determined that the words 'steal or purloins' means a taking wherein a defendant "without permission...retains possession of property belonging to another." (emphasis added) United States v. Schneider, 14 F.3rd 876, 879 (1994).

Under a statute intended to protect union funds from dishonest officials, the Seventh Circuit stated that a 29 U.S.C. §501(c) "conversion is an unauthorized assumption of the incidents of ownership...The distinction between theft and salary is permission." (emphasis added) United States v. Vandenbergen, 969 F.2d 338, 340 (1992). In another Section 501(c) case, the Fourth Circuit determined that "the act...must be without authorization from the owner...There can...be no interference with the owner's rights...if the owner has given permission to the act in question." (emphasis added) United States v. Stockton, 788 F.2d 210, 216 (1986).

In a recent Section 501(c) case, the Eighth Circuit upheld a conviction wherein the government had plead and proved that the defendant's use of funds was unauthorized. United States v. Cantrell, 999 F.2d 1290 (1993). The court, however, then stated that "lack of authority" is not an essential element of an offense under the statute and concluded that proof of lack of authority is simply one way of establishing the defendant's fraudulent intent. Id. at 1292. The court's dicta was based on a line of Section 501(c) cases which allow conviction upon proof of defendant's bad faith or that a defendant lacks a good faith belief that the expenditure was for the union's benefit. See United States v. Butler, 954 F.2d 114 (2nd Cir. 1992).

On the other hand, courts construing 18 U.S.C. §656 (theft and embezzlement by bank employees) have consistently required proof that the defendant's acts were unauthorized, unjustified, or otherwise wrongful. United States v. Wester,

90 F.3rd 592 (1st Cir. 1996); United States v. Campbell, 52 F.3rd 521 (5th Cir. 1995); Hernandez v. United States, 608 F.2d 1361 (10th Cir. 1979). Likewise, 18 U.S.C. §657 (financial institutions) cases have deemed 'misapplication' to require proof that the accused distributed the funds under a misrepresentation intended to deceive other officials. United States v. Orano, 62 F.3rd 1180 (9th Cir. 1995); United States v. Mussacchio, 968 F.2d 782 (9th Cir. 1991). In Chandler v. United States, 66 F.3rd 1460, 1468 (1995), the Eighth Circuit approved a Section 657 jury instruction which stated that 'misapplication' "means the unauthorized or wrongful use of the...funds."

Very recently, this Court considered whether a 20 U.S.C. §1097(a) misapplication required a finding of fraudulent intent. In rejecting the defendant's argument, the Court noted that the Seventh Circuit's definition of 'willful misapplication' "catches only the transgressor who intentionally exercises unauthorized dominion over...student loan funds...." (emphasis added). Bates v. United States, ___U.S. ____, Case No. 96-7185, 1997 WL 679414, *6 (U.S.Ind.). The Court, with apparent concurrence of the government, approved that part of the Seventh Circuit's definition of 'misapplication' which requires the government to allege and prove that the challenged act was unauthorized. Id., FN 7. While Bates does not control the issue herein, it does provide guidance as to whether Section 666 and Section 1163 offenses require proof that the accused acted without the owner's consent or without authority of the owner.

The words used by Congress support the conclusion that Section 666 and Section 1163 offenses require proof that challenged act was without the owner's consent or without authority. The district court described the offenses herein as theft and misapplication. Appendix A-2. The jury, however, was allowed to consider all offenses listed in the statutes. Appendix D. The Eighth Circuit characterized the convictions

as being for theft or misapplication, Appendix A-1, pg. A-10, and then concluded that Petitioner's acts constituted conversion. Id., pg. A-11. Black's Law Dictionary (6th ed. 1991), pg. 1413, defines 'to steal' as "the commission of theft, that is the felonious taking...of the personal property of another...without right and without leave or consent of the owner." (emphasis added) 'Conversion' is "an unauthorized...exercise of the right of ownership over...chattels belonging to another...." (emphasis added) Id. at pg. 332.

Section 666 reaches those who embezzle, steal, obtain by fraud, "or otherwise without authority" knowingly convert or intentionally misapply property of a program receiving federal funds. In United States v. Urlacher, 979 F.2d 935, 938 (1992), the Second Circuit determined that 'misapplication' under Section 666 covers the use of funds in an unauthorized manner. cf. United States v. Moeller, 80 F.3rd 1053 (5th Cir. 1996). In United States v. Rosin, 892 F.2d 649, 650 (7th Cir. 1990), in affirming convictions for conversion under Section 1163, the court stated: "None of the payments were authorized by the tribe...."

Practical implications also support the conclusion that Congress intended that the Section 666 and Section 1163 larceny offenses include the essential element of the owner's lack of consent. As Leech Lake's tribal government, the LLRBC is vested with the exclusive right to manage tribal property. Davids v. Coyhis, 857 F.Supp. 641, 647 (E.D.Wisc. 1994); U.S. ex rel Mosay v. Buffalo Bros. Mgmt., 20 F.3rd 739 (8th Cir. 1994); Runs After v. United States, 766 F.2d 347, 352-53 (8th Cir. 1985). Yet, not one sitting member or current employee of Leech Lake's tribal government was called by the government at trial. Former LLRBC member James Michaud was the only witness who had served on the LLRBC at RRM's inception and in June and July 1990, the time of the offenses charged. Michaud expressed no

disagreement with the distribution of RRM assets and did not indicate that the LLRBC had any objection thereto. Unless these offenses require proof that the taking occurred without the tribal government's permission or that the accused acted otherwise without authority, disgruntled tribal members will be free to challenge every expenditure of tribal funds, including salaries of tribal officials, as larceny. The only protection that tribal officials and those with whom they do business will have from scurrilous charges of theft will be the discretion of the individual prosecutor reviewing the case. "A criminal statute must...establish minimum guidelines to prevent law enforcement, prosecutors and juries from pursuing their personal predilections." United States v. Chandler, supra. pg. 1466.

Congress could not have intended such an intrusion on the right of tribal self government when it enacted Sections 666 and 1163. Congress has specifically limited a tribal government's right to enter certain contracts without prior federal approval. See 25 U.S.C. §81. Every tribal contract would be subject to second guessing by the local U.S. attorney if these larceny offenses do not require proof that the property transfer occurred without authority or without the tribal government 's consent.

The Eighth Circuit determined that "the jury could 'and apparently did' find that the LLRBC did not in fact assent to Finn's ownership...and the agreement was therefore void." Appendix A-1, pg. A-11. Not only is the record insufficient to establish that the LLRBC did not consent to Petitioner's acts in 1990, but the jury charge failed to require a finding that the LLRBC had not assented to Petitioner's ownership or that the original RRM documents were void. The government did not offer any instructions to guide the jury in applying the relevant contract law and parol evidence rules which are essential to determining the contract issues which underlie the theory of the case adopted by the Eighth Circuit.

The relevant portions of the Section 666 and Section 1163 jury instructions are contained in Appendix D. The "essential element" charge for Section 1163, Instruction No. 32, required the jury to find (1) that the defendant embezzled, stole, knowingly converted, willfully misapplied or permitted to be misapplied money or property; (2) that the money or property belonged to an Indian tribal organization; and (3) that the defendant did so knowingly and willfully. The Section 666 charge, Instruction No. 35, lists the same elements. Instruction No. 33 supplements the charges but provided the jury with no definition of "steals," "theft" or "to defraud." The definitions provided do not require a finding that the act was without authority while allowing the jury to find the offense of misapplication or conversion "without any wrongful taking."

Because the instructions plainly failed to submit an essential element of the offense to the jury, the Eighth Circuit had to assume that the jury had considered and found that the LLRBC had not agreed to Petitioner's ownership and that the original RRM documents were void. The necessity of having to make this assumption to sustain the convictions amplifies the constitutional defect of the jury charge. A reviewing court can only be certain that a jury considered every essential element necessary to a conviction if the element is included in the instructions.

The Court very recently noted that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." (emphasis added) United States v. Gaudin, 515 U.S.___, 132 L.Ed.2d 444, 452 (1995). "The prosecution bears the burden to proving all elements of the offense...and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." (emphasis added) Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 188 (1993).

Both the weight of authority and public policy support the conclusion that Sections 666 and 1163 codify the common law larceny requirement that the offender act without authority or without the owners consent. Petitioner objected at every stage of the proceedings below to the government's failure to show that his distribution of RRM's assets in 1990 occurred without the LLRBC 's consent or permission. Petitioner did not waive his objection to the instructions, and he challenged the sufficiency of the evidence when the government rested, after the jury verdict, and on appeal to the Eighth Circuit.

A defendant's Fifth Amendment right to due process is infringed by a conviction resting on a record which does not allow a jury to find, beyond a reasonable doubt, each element essential of the offense charged and the facts necessary to that offense. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979); Burks v. United States, 437 U.S. 1, 57 L.Ed.2d 1 (1978). A defendant's right to due process and Sixth Amendment right to a jury trial are violated by a jury charge which does not require the jury to find an essential element of the offense. United States v. Gaudin 515 U.S.___, 132 L.Ed.2d 444 (1995); Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 188 (1993). "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." Gaudin, supra, 132 L.Ed.2d at 458. Where the record lacks any evidence of an essential element, the remedy is reversal of the conviction and entry of judgement of acquittal. Burks v. United States, 473 U.S. 1, 57 L.Ed.2d 1 (1978).

Petitioner's convictions under Sections 666 and 1163 without an iota of proof that the LLRBC objected to the 1990 distribution of RRM property violates his constitutional rights. The Section 666 and 1163 convictions must be reversed. Because Petitioner's conspiracy and mail fraud convictions rest on the same flawed theory of the case as the Section 666 and

1163 convictions and may rest upon the same unconstitutional basis, these convictions must also be reversed or vacated. Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39 (1979).

I.(b) The theory of the offense charged by the grand jury required proof that the LLRBC did not consent to the 1990 dissolution of RRM. Petitioner's conviction without such proof required an amendment of the charge or a fatal variance of proof in violation of his Fifth Amendment rights.

At Petitioner's sentencing in the aborted misdemeanor plea proceedings in March 1995, the government told the court that "RRM was a corporation that was created in 1985 by the tribal government upon the advice of its attorney...the principal effect of the RRM...plan was an unconscionable, risk free financial windfall for the owners of RRM." Appendix C. The government continued: "It is not surprising that the LLRBC was taken advantage of in the RRM transaction since the principal owner of RRM was...their own lawyer, 'Skip' Finn." Id. "The RRM transaction was promoted by defendant Finn as a 'modified self-insurance' plan...In reality, RRM had no assets and could not pay any claims...The defendant was able to get the RRM...plan approved and implemented by the LLRBC for two reasons...the defendant was the LLRBC's own attorney who would have otherwise been responsible for scrutinizing the contracts and advising...the LLRBC about the unconscionable and one-sided nature of the contracts." Id.

In June 1995, the grand jury adopted the government's theory that attorney Finn had wrongfully induced his client, the LLRBC, to enter an unconscionable contract. The **INDICTMENT**, pg. 3, alleged: "[A]s attorney for the Leech Lake Band...Finn owed...a duty to refrain from entering into business transactions with a client that are not fair and reasonable to the client and fully disclosed in writing...Finn also had a duty...to refrain from exploiting such confidences

for personal enrichment and aggrandizement." Id. And "on November 5, 1985, defendants...executed a...Subscription Agreement along with Hartley White under the terms of which White, for the RBC, subscribed to...250 shares...and Finn subscribed to 750 shares...." Id., at pg. 8, par. 9. "Further, the defendants having misrepresented the insurance protection provided by said insurance policy....submitted a premium schedule...requiring payments from the RBC for said insurance protection...." Id. at pg. 7, par. 5. And, "White as Chairman of the RBC executed an 'Insurance Agreement'...that required the RBC to make payments to RRM, Inc. in exchange for...coverages the defendants then knew did not exist." Id. at pg. 8, par. 11. Apparently to support the June and July 1990 theft charges under Sections 666 and 1163 as well as to avoid the statute of limitations bar on the fraud theory, the Grand Jury also alleged: "White as Chairman...executed a 'Shareholder's Agreement'...'the reserves shall belong to the shareholders...and cannot be distributed unless the parties...agree...to modification of this Agreement or dissolution of RRM.' The RBC never agreed to any modifications of said agreement nor to the dissolution of RRM, Inc." (emphasis added) Id. at pg. 9, par. 12.

The theory of the case adopted by the Eighth Circuit is dramatically different: the LLRBC never "assented" to the terms of the documents purportedly signed by former chairman White in November 1985 and January 1986, and because there was no contract the 1990 property distribution constituted conversion of tribal property. White's disavowal of his signatures on some documents and his testimony that he was unaware of Petitioner's ownership interest and other terms of the documents served as the basis of the court's conclusion that the LLRBC had not agreed to the terms of the "fraudulently procured" RRM agreement and that they had been. The indictment does not indicate that the grand jury considered any of these facts to be part of the offense it had

charged. Nowhere in the sixty-eight pages of the indictment is one of these essential allegations made.

The grand jury did allege that the 1990 dissolution and distribution of RRM property by Petitioner was without the LLRBC's permission: "The RBC never agreed to any modifications or said agreement nor to the dissolution of RRM, Inc." **INDICTMENT**, pg. 9, par. 12. If the owner's lack of consent is not essential to proving every violation of Section 666 or Section 1163, the indictment's theory of fraud and theft required such proof in this case. There is no other factual allegation in the indictment to support the necessary element that Petitioner's acts in June and July 1990 were unauthorized.

The record contains no evidence to support a finding that the LLRBC objected to the acts of Petitioner which are the basis of the larceny convictions. The Eighth Circuit determined that the record did allow the jury to find that the LLRBC had not assented to the original terms of the 1985/1986 RRM documents signed by White even though the record is devoid of any evidence to indicate that the LLRBC desired to be relieved of its contract. This conclusion, however, does not establish that the LLRBC objected to the 1990 property distributions which underlie the theft charges.

Petitioner challenged the government's new theory of the offense before the Eighth Circuit: "The government's shifting characterization of the RRM plan is shocking." **APPELLANT'S REPLY BRIEF**, pg. 2. "The language of the Indictment further reveals the true nature of the fraud contemplated by the grand jury...it is the government, not Finn, who strives to redraft the grand jury's allegations to avoid dismissal under §3282." Id. at pg. 5. Without any discussion of Petitioner's argument, the court concluded that Petitioner's arguments were "out of step with the charges and the jury's findings." Appendix A-1, pg. A-11. Petitioner again attempted to bring the error to the court's attention in his

PETITION FOR REHEARING, pg. 11: "Whether viewed as an essential element of the offense or an unwarranted intrusion on the right of tribal government to make its own contracts, Finn has...argued...proof that the RBC did not consent to the distribution in 1990 is essential to the theft/fraud charged in this case."

The Fifth Amendment's grand jury clause serves as a check on prosecutorial discretion. When an offense proven at trial is not fully contained in the indictment and the evidence broadens the bases for conviction, the variance is fatal. Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960). "An amendment occurs 'when the essential elements of the offense set forth in the indictment are altered...by the prosecution or the court....' (cite omitted)" United States v. Huntsman, 959 F.2d 1429, 1435 (8th Cir. 1992).

As shown above, Petitioner's convictions under Sections 666 and 1163 are based upon evidence which broadened the offense charged by the grand jury. Facts necessary to support the government's theory of the case were not alleged by the grand jury and the record fails to establish that the LLRBC did not agree to the 1990 dissolution of RRM as alleged by the grand jury. Whether viewed as an essential element of a Section 666 or Section 1163 larceny charge or as an essential element of the particular offense charged by the grand jury, proof that the LLRBC objected to the Petitioner's actions in 1990 in dissolving RRM was necessary to a conviction. Petitioner's convictions on the record herein render the Fifth Amendment's grand jury protection against prosecutorial abuse meaningless.

II. A conviction resting upon inherently incredible evidence and misleading arguments knowingly advanced by the government violates a fundamental principle of due process: the duty of the government to seek the truth at all times.

The Court "has taken special care to assure that prosecutorial misconduct in no way impermissibly infringes" specific constitutional guarantees. Donnelly v. DeChristoforo, 416 U.S. 637, 40 L.Ed.2d 431, 437 (1974). Deliberate deception of a jury by the prosecution on material facts is incompatible with basic demands of the American criminal justice system. Giglio v. United States, 405 U.S. 150, 154, 31 L.Ed.2d 104, 108 (1972). "There can be no retreat from that principle here." Miller v. Pate, 386 U.S. 1, 7, 17 L.Ed.2d 690, 694 (1967). It matters not whether the evidence is unsolicited by the government if it is material and known by the prosecutor to be false. Napue v. Illinois, 360 U.S. 264, 269, 3 L.Ed.2d 1217, 1221 (1959). The government has a duty to correct false evidence when it appears. United States v. Bigaleisen, 625 F.2d 203, 208 (8th Cir. 1980).

Rejecting Petitioner's statute of limitations challenge, the Eighth Circuit concluded that "the government's theory of the case, a theory the evidence supports, was that the documents **purportedly** signed by White...were fraudulently procured...Based on this evidence, the jury could (and apparently did) find that the LLRBC did not in fact assent to Finn's ownership...the agreement was therefore void...the defendants' conversion of RRM's funds to their own purposes in 1990 was unlawful...." (emphasis added) Appendix A-1, pg. A-11. The court's conclusion rested primarily upon former tribal chairman White's testimony: the key documents were "the Subscription Agreement, the Debenture Agreement, the Shareholder's Agreement, and the Insurance Agreement. White testified that he did not believe that all his **purported** signatures on these documents were genuine, and he clearly stated that he did not understand the impact of any of these agreements when he signed them." (emphasis added) Appendix A-1, pg. A-5.

As more fully set out in Section I.(b) above, during the aborted misdemeanor plea proceedings the government told

the district court that (1) "the principal owner of RRM was...'Skip' Finn"; (2) "the RRM transaction was...a 'modified self-insurance plan'"; and (3) "the money paid to...RRM no longer belonged to the Leech Lake Band." Appendix C. A March 11, 1992 interview of former chairman Hartley White by the DOT-OIG was the basis for these statements. Appendix B.

White's memory of critical facts prior to any public accusation of criminal conduct relating to RRM and four years closer to the events in question exonerates Petitioner of any larceny offense in the establishment of RRM and the distribution of its assets in 1990. White recalled 1) that individual ownership was contemplated in 1985, 2) that anyone who invested would benefit when RPM dissolved, and 3) that the law firm of Finn and Mattson was to be the major beneficiary of any money remaining at dissolution. White's 1992 memory was supported by statements obtained from tribal staff, by the documents executed by White, and other documentary evidence. In 1988 the LLRBC's independent CPA concluded that Petitioner was the primary owner of RRM, (Tr. 1944, 1982-83, 2084-85), and that "the relationship between RRM and the LLRBC with regard to workers' compensation...is that of a custodial relationship...The general liability insurance is purchased from RRM...The premium rates charged...are insurance competitive rates." All five of the LLRBC members and its two top administrators signed a writing to this effect in 1989. Gov.Ex. 178; Appendix H.

At trial on direct examination White testified that he was not aware of Finn's ownership interest in RRM in 1985 and that he understood that all funds held by RRM were to be returned to the LLRBC at dissolution. The government made no effort to correct or clarify White's totally contradictory pre-trial statement. White, on cross examination, then repeatedly affirmed that individual ownership in RRM was indeed

contemplated by the LLRBC in 1985 when RRM was established and that he understood the law firm of Finn and Mattson would be the major beneficiary of any funds remaining at RRM's dissolution:

> "Q: You knew more than just a law firm. They were going to get more than retainer...'the primary beneficiaries of that money would have been the law firm of Finn and Mattson'? A: Yes. Q: So you did know, didn't you? A: Yes." (Tr. 791-92)

> "Q: And...it was your understanding that anyone who bought into RRM would have benefited from the money when RRM dissolved? A: That's correct. Q: And it was your understanding that the primary beneficiaries of the money would have been Finn and Mattson, right? A: Right." (Tr. 850-51)

See also Tr. 673-74, 686-87, 838, 865. White's testimony on these key facts is so contradictory as to render his testimony inherently incredible. No rational fact finder could find beyond a reasonable doubt that the contract was invalid because White was not aware of Petitioner's interest in RRM when he executed the documents.

The government's pretrial disclosures gave no indication that White would testify contrary to his March 1992 statement. Whether or not White's false trial testimony was anticipated, the government capitalized on White's testimony to support a new theory of fraud/theft which is inconsistent with the theory of the indictment and the facts presented by the same prosecutor to the district court in March 1995.

Solely to vilify Petitioner and prejudice the jury, the government also intentionally and falsely created confusion about whether or not White's signatures on the relevant documents were genuine. This evidence was material to the

court's conclusion: "White testified that he did not believe that all his purported signatures...were genuine." (emphasis added) Appendix A-1, pg. A-5 and "The government's theory of the case was that the documents purportedly signed by White...were fraudulently procured...." (emphasis added) Id. at pg. A-11.

Handwriting analysis conducted by the Minnesota Bureau of Criminal Apprehension conclusively established that White had personally signed the key documents identified by the Court of Appeals. White also affirmed at trial that he had signed the relevant documents. (Tr. 695, 698, 703, 760-61, 765, 767, 797) While White questioned his signatures on two related documents, neither of the documents constituted part of the LLRBC's agreement with RRM/Finn.

Because White would not affirm his signatures on the agreement documents on March 11, 1992, Special Agent Hanbury obtained exemplars from White at the conclusion of the interview. See Appendix B. When it became apparent during trial that the government was making an issue of White's signatures, the defense demanded and obtained a report of the expert's analysis of White's signatures. The expert then testified that White had signed the RRM Charter as well as the "key documents" identified by the Eighth Circuit: the Subscription Agreement, the Shareholder's Agreement, and the Insurance Agreement. (Tr. 1563-68)

Petitioner's conviction cannot stand in this light. Unable to coerce a plea from Petitioner and unable to prove that the LLRBC had any objection to the June and July 1990 distribution of assets which were the basis of the larceny/fraud charges, White's inherently incredible trial claim that he was unaware of Petitioner's ownership in RRM and that all funds remaining at RRM's dissolution were to be returned to the LLRBC became crucial to saving the government's case on appeal. However, all of the documentary evidence introduced, the fact that White did sign each of the key documents, the

testimony of McCarthy and Michaud that individual ownership of RRM was originally contemplated, Petitioner's control of RRM's operations and funds from inception to dissolution and the LLRBC's May 1989 signed affirmation establish the truth of White's trial testimony that he had known in 1985 that private ownership of RRM was planned and the law firm of Finn and Mattson would be the major beneficiary of any funds remaining at RRM's dissolution.

The government was aware that White's contradictory testimony was false and had a duty to correct it when it appeared for the first time at trial. United States v. Bigaleisen, 625 F.2d 203, 208 (8th Cir. 1980). Instead, the government chose to change its view of the truth to ensure the convictions and preserve them on appeal. The prosecutor's absurd attempt to rehabilitate White after he had affirmed the truth of his 1992 statements is telling: "Q: Were you telling more of the truth then or are you telling more of the truth now?" Without truth, there can be no justice.

CONCLUSION

Petitioner prays that the Court exercise its discretion to vacate the conviction of an innocent man in this case of first impression. Petitioner was convicted for the illegal taking of tribal property without a shred of evidence to indicate that his acts were contrary to the wishes of his tribal government. whether viewed as an essential element of the statutory offenses or of the grand jury's theory of the case, proof that Petitioner acted without consent of the owner or without authority was necessary to a conviction. The knowing use of false evidence and misleading arguments by the government to preserve the convictions on appeal provides a separate basis for vacating the judgement of the Eighth Circuit.

The decision below conflicts with the teachings of Morissette v. United States, 342 U.S. 246, 96 L.Ed. 288

(1952) and Bates v. United States, ___U.S.___, Slip Opinion, Case No. 96-7185, 1997 WL 679414 (U.S.Ind.). Because the record contains no evidence which would allow the jury to find an essential element of the offense, the Eighth Circuit's affirmance of the convictions is also contrary to the holdings of Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182 (1993) and United States v. Gaudin, 515 U.S.___, 132 L.Ed.2d 444 (1995).

The government usurped the right of tribal self-government and substituted the judgement of the prosecutor for that of the elected governing body of the Leech Lake Reservation. The common law larceny requirement of proof of the lack of the owner's consent is an important protection against such prosecutorial abuse. Allowing the government to prosecute under 18 U.S.C. §666 and 18 U.S.C. §1163 without necessity of proving that the accused acted without consent of the owner or without authority will allow the government unprecedented power and greatly expand the reach of the statutes.

If the Court is not inclined to review this matter, Petitioner respectfully requests that the Court consider remanding this case for reconsideration in light of the Court's recent holdings in United States v. Gaudin, supra, and Bates v. United States, supra.

RESPECTFULLY SUBMITTED,

Harold "Skip" Finn, Pro Se
BOP Reg. No. 06643-041

DATE: December 15, 1997

APPENDIX

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3417

United States of America, *
*
Appellee, *
*
v. *
*
Alfred Pemberton, also known as Tig, *
*
*
Appellant. *

No. 96-3498

Appeals from the United States District Court for the District of Minnesota.

*
United States of America, *
*
Appellee, *
*
v. *
*
Daniel Brown, *
*
*
Appellant. *

No. 96-3527

United States of America, *
*
Appellee, *
*
v. *
*
Harold Finn, also known as *
Skip, *
Appellant *

Submitted: May 19, 1997
Filed: July 31, 1997

Before RICHARD S. ARNOLD, Chief Judge, and BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BOWMAN, Circuit Judge.

Alfred "Tig" Pemberton, Daniel Brown, and Harold "Skip" Finn appeal their convictions on various charges related to the insurance arrangements of the Leech Lake Band of Chippewa Indians (the Band) in the late 1980s and early

1990s. Pemberton and Finn also appeal their sentences. We affirm the judgments of the District Court.[1]

I.

Because of the complexity of this case and the many fact-specific arguments raised by the defendants, we relate the facts of this case in somewhat more detail than is customary. Pemberton, Brown, and Finn are enrolled members of the Band. This tale begins in 1985, when Pemberton was secretary-treasurer of the Leech Lake Reservation Business Committee (LLRBC), the five-member governing body of the Band.[2] At the time, Brown was one of three district representatives on the LLRBC, and Finn was the Band's legal counsel.[3]

Before 1985, the Band routinely purchased property-casualty and liability insurance to cover the risks associated with several buildings owned by the Band and several businesses operated by the LLRBC on behalf of the Band. In 1985, however, a crisis in the insurance market threatened to make insurance too expensive for the Band to afford; the only company willing even to quote a premium for the year beginning July 1, 1985 would have increased the previous year's property-casualty premium from $122,000 to $254,000 and the previous liability premium from $31,000 to $187,000.

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

[2] The LLRBC was later renamed the Tribal Council, an appellation that more appropriately reflects its purpose.

[3] Finn had been secretary-treasurer of the LLRBC in the 1970s, before he attended law school. Brown was elected chairman of the LLRBC in 1988. Pemberton remained secretary-treasurer until 1990, when he lost an election, but he was elected chairman in 1992.

Because of the prohibitive cost, the Band went without insurance for a time in 1985.

At a meeting of the LLRBC on October 1, 1985, Finn and an LLRBC staff member presented a possible solution. As Finn described it, the Band could "self-insure" by depositing funds annually in a segregated bank account and paying claims out of that account. Several individuals present at the October 1 meeting testified that Finn stated that the Band would own any funds not used to pay claims, as is typical of self-insurance programs. Finn suggested that he administer the program by collecting the contributions and managing the payment of claims. Witnesses disagreed whether Finn proposed to retain a portion of the contributions as an administrative fee or whether he would render his services pursuant to his retainer agreement with the Band. Because of the possibility that the Band might suffer a large loss in the early years of the plan, before any significant reserves could be developed, Finn suggested that the LLRBC purchase excess insurance coverage from a traditional insurance company. The LLRBC voted unanimously to approve the self-insurance program as described by Finn, and adopted a resolution establishing a corporation named Reservation Risk Management, Inc. (RRM) as "a corporate sub-entity of the Leech Lake Reservation Business Committee." LLRBC Resolution No. 86-26 (Oct. 1, 1985). RRM's charter stated that the company was formed under the authority of the Minnesota Chippewa Tribe (of which the Leech Lake Band is one of six constituent bands) to manage the Band's self-insurance program.

During the next few weeks, it became apparent that insurance companies were unwilling to provide excess insurance coverage to the Band at affordable rates. Finn reported this development at an LLRBC meeting on October 29. At that meeting, the LLRBC voted nevertheless to proceed with the self-insurance program, which was to be administered by RRM, and the LLRBC authorized its

chairman and secretary-treasurer to execute the necessary documents. Throughout the next several months, several key documents were executed by LLRBC Chairman Hartley White and Pemberton on behalf of the LLRBC and by Finn on behalf of RRM. For ease of reference, we will refer to these documents as the Subscription Agreement, the Debenture Agreement, the Shareholders' Agreement, and the Insurance Agreement. White testified that he did not believe that all of his purported signatures on these documents were genuine, and he clearly stated that he did not understand the import of any of these agreements when he signed them. Instead, he relied on the advice of Finn, whom he considered to be a trustworthy and loyal member of the Band.

The Subscription Agreement gave 25% of the shares in RRM to the LLRBC and 75% of the shares to Finn. In the Debenture Agreement, Finn and his law partner, Kimball Mattson, pledged to tender as much as $450,000 to RRM if necessary to avoid a shortfall in "Fund C," the fund from which RRM was to pay claims. RRM was obligated to repay any sums advanced by Finn and Mattson, who also had the option to cancel the agreement on ninety days' notice and receive 20% interest per annum on any balance owed to them by RRM. In exchange for their standby promises to contribute to RRM, Finn and Mattson were to receive 15% of the premiums collected by RRM. The Debenture Agreement was executed by Finn on his own behalf and on behalf of RRM; the LLRBC was not a party to this contract.

The Shareholders' Agreement between the LLRBC and Finn described the internal workings of RRM. Fifteen percent of premiums received were to be deposited in Fund A and paid annually to debenture holders, as described above. The other 85% of each premium payment was to go into Fund B, to be used for operating expenses, which Finn had previously estimated at $100,000 per year. Any excess in Fund B was to be regularly transferred to Fund C, from which claims would

be paid. The Shareholders' Agreement stated that the "reserves in Fund C shall belong to the shareholders of RRM" but were not to be distributed to the shareholders except on the dissolution of RRM. Shareholders' Agreement ¶ 3(b) (Jan. 14, 1986). In addition, if the LLRBC withdrew from the insurance program any time before October 31, 1990, the LLRBC would forfeit any claim to the assets of RRM, and those assets would be distributed among the other shareholders.

The Insurance Agreement set up a ten-year insurance program at premiums beginning at $300,000 per year and escalating to $450,000 per year (subject to upward adjustment if deemed necessary by the directors of RRM). RRM agreed to seat two persons nominated by the LLRBC on the board of directors of RRM. Pursuant to this agreement, RRM issued to the LLRBC an insurance policy providing on its face more than $8 million in property-casualty coverage and $300,000 in liability coverage.

The government's risk-management expert testified that, in combination, these documents created a program that was neither insurance (because RRM did not assume the risk of loss) nor self-insurance (because persons other than the LLRBC had ownership interests in funds remaining after the payment of losses). In particular, the expert testified, the Shareholders' Agreement "essentially took the Band money and gave it to Mr. Finn." Tr. at 475. To demonstrate the workings of the program, she calculated what would have happened if the RRM arrangement had lasted one year, during which the LLRBC suffered no losses, and Finn had waived the forfeiture provision and allowed the LLRBC to retain its equity despite the early cancellation. The LLRBC would have paid $300,000 to RRM, of which 15% ($45,000) would have gone to Finn and his partner pursuant to the Debenture Agreement and another $100,000 (or 33%) would have gone to administrative expenses (essentially to Finn, his firm, and

RRM's board members). Of the $155,000 remaining in Fund C, the LLRBC would receive one-fourth ($38,750) when the program was cancelled. Thus, even without any claims or losses (i.e., the best-case scenario from the perspective of the LLRBC), the LLRBC would receive only 13% of its payment back at the end of the year. Not surprisingly, then, the expert concluded that "[t]he RRM documents effectively deprive the Band of what the benefits of self-insurance should have been" and that "the terms of the transaction as a whole were commercially unreasonable in the realm of self-insurance, risk management and insurance." Tr. at 453-54.

In January 1987, the LLRBC appointed Pemberton and Brown as its two representatives on the board of RRM. Shortly thereafter, Pemberton was elected secretary-treasurer and Brown vice-president of RRM. (Finn previously had been named president and was a board member.) Finn's wife and Pemberton's wife also were elected to the five-member board, and each of them gave a proxy to Finn, giving him effective control of the company. Finn soon transferred some of his equity ownership of RRM to Pemberton and Brown in exchange for their investment of $18,000 and $12,000, respectively, giving Pemberton approximately 7% and Brown approximately 5% ownership of the company.[4]

Later in 1987, an auditor began to audit the Band on behalf of the Department of the Interior for fiscal year 1986. RRM immediately became an issue because the LLRBC's October 1985 resolution established the company as a tribal entity, which would require it to be included in the audit. When the auditor wrote to Pemberton seeking more information about RRM, Finn responded with a letter stating

[4] The parties dispute the source of the funds invested, but it does not matter whether the $30,000 came from accrued leave owed to Pemberton and Brown (as they claim) or from the Band's landfill trust account (as the government claims). Regardless, Pemberton and Brown invested in RRM and received equity stakes.

that RRM was chartered by the state of Minnesota and that the LLRBC owned only 25% of the company. (In fact, Finn had organized a state-chartered corporation under the name "Reservation Risk Management, Inc.," a corporation that was evidently inactive. When we refer to "RRM," however, we mean the tribally-chartered company.) The auditor inquired further of Pemberton whether any of the Band's elected officials stood to benefit from the Band's association with RRM. Again, Finn responded: "Please be advised that the Leech Lake Reservation elected officials do not stand to profit from its association with RRM, Inc." Letter from Finn to auditor of Mar. 3, 1988. After some further ousting with Finn, the auditor gave up on RRM and did not include the company in his audit. When the auditor and his partners later had second thoughts, they sent a representation letter to the LLRBC, asking the members to sign if they agreed with certain statements, including the following: "All prior [LLRBC] resolutions establishing some type of control over RRM by the Leech Lake RBC have been rescinded. There are no RBC elected officials who exercise control or who share in the profits of RRM." Letter from auditor to LLRBC officials of Jan. 11, 1989. Brown and Pemberton signed the letter.

In 1989, the Bureau of Indian Affairs notified the Band of fraudulent practices involving insurance companies and warned that in the future, all insurance companies doing business with Indian tribes would have to be licensed by the relevant state government. Accordingly, the LLRBC decided to end its arrangements with RRM. Of the approximately $2 million collected by RRM since its establishment, the LLRBC received about $850,000 in a complicated series of transactions when the company was dissolved. During the life of RRM, it paid only $61,000 in insurance claims, while Finn took hundreds of thousands of dollars out of the company--some for cash and some to purchase items such as cars, boats, golf carts, professional football and baseball tickets, and real

estate. All three defendants also received thousands of dollars in fees for serving on the board of directors of RRM.

As RRM was finally dissolved in mid-1990, Finn distributed considerable sums to the defendants. On May 2, 1990, Finn purchased an annuity for the benefit of Brown in the amount of $43,500; Brown later applied for a cash payout of 10% of the annuity and received the payout in October. On June 25, 1990, Finn distributed $62,000 to Pemberton, $199,547.10 to Mattson (Finn's law partner), and $286,000 to himself. Ten days later, Finn paid himself another $50,000.

In November 1990, a federal grand jury began investigating RRM. A federal agent served Finn with a grand jury subpoena in January 1991 at the Minnesota capitol building, where Finn had just been sworn in as the first Native American elected to the state Senate. Finn eventually was charged by information in 1994 with a misdemeanor count of misapplying tribal funds, in violation of 18 U.S.C. § 1163 (1988). Finn pleaded guilty, but when he was disappointed in the sentencing court's assessment of the sentencing factors, he exercised his right, pursuant to his plea agreement, to withdraw the guilty plea.

On June 7, 1995, the grand jury returned the indictment that began this case. Finn, Pemberton, and Brown were charged with one count of conspiracy, in violation of 18 U.S.C. § 371 (1988), and, in varying combinations, with nine counts of felony theft or misapplication of tribal funds, in violation of 18 U.S.C. § 1163; four counts of theft concerning a program receiving federal funds, in violation of 18 U.S.C. § 666 (1988); one count of bribery concerning a program receiving federal funds, in violation of 18 U.S.C. § 666; five counts of money laundering, in violation of 18 U.S.C. § 1957 (1988); three counts of mail fraud, in violation of 18 U.S.C. §§ 1341, 1346 (1988 & Supp. II 1990); two counts of making a false statement, in violation of 18 U.S.C. § 1001 (1988); and

one count of obstruction of justice, in violation of 18 U.S.C. § 1503 (1988).

After a seventeen-day trial, a jury convicted all three defendants of conspiracy. In addition, Finn was convicted of four counts of theft or misapplication of tribal funds, four counts of theft concerning a program receiving federal funds, and three counts of mail fraud; Pemberton was convicted of one count of theft or misapplication of tribal funds and one count of theft concerning a program receiving federal funds. The District Court sentenced Finn to fifty-seven months in prison, fined him $25,000, and ordered him to pay restitution of $400,000 to the Band. Pemberton was sentenced to thirty-three months in prison and ordered to repay $66,430 to the Band. Brown was placed on probation for two years, including one year of home detention, fined $7500, and ordered to pay restitution of $31,412.

II.

Of the many points raised by the defendants on appeal, we consider first several overarching arguments that attack the heart of the government's case.

A.

The parties agree that all of the crimes charged in this case are subject to the five-year limitation period of 18 U.S.C. § 3282 (1988). The defendants argue that § 3282 bars this prosecution. On its face, this argument appears specious, for all of the counts on which the defendants were convicted involve conduct occurring on or after June 13, 1990, less than five years before the date of the indictment. (For mail fraud, the relevant date is the date of the mailing. See, e.g., United States v. Eisen, 974 F.2d 246, 263 (2d Cir. 1992), cert. denied, 507 U.S. 998, 1029 (1993); United States v. Dunn,

961 F.2d 648, 650 (7th Cir. 1992). For conspiracy, the relevant date is the date of the last overt act in furtherance of the conspiracy. See United States v. Rabinowitz, 56 F.3d 932 933 (8th Cir. 1995).)

The defendants argue, however, that if there was wrongdoing in this case, it occurred when Finn induced the LLRBC to set up the self-insurance plan that gave him a 75% stake in the proceeds; in other words, according to the defendants, this is a case of fraudulent inducement. Any theft or misapplication, the argument continues, occurred at the latest in 1989, when the LLRBC made its last payment to RRM. After that point, the defendants could not have stolen or misapplied RRM's funds, for they owned RRM. (Actually, they owned only three-quarters of RRM, but the defendants finesse this point by arguing that they kept less than three-fourths of RRM's assets when the company was wound up.)

This argument misses the point that the government's theory of the case, a theory the evidence supports, was that the documents purportedly signed by White on behalf of the LLRBC were fraudulently procured, and therefore that the defendants never had a legitimate claim to the money. We note that White admitted that he signed the Subscription Agreement--the agreement that purported to give Finn 75% of the equity in RRM--but testified that it said nothing about Finn's ownership when he signed it. See Tr. at 695-96. In addition, the evidence shows that RRM kept its funds in bank accounts that appeared to belong to the LLRBC. Based on this evidence, the jury could (and apparently did) find that the LLRBC did not in fact assent to Finn's ownership of three-fourths of RRM, and the agreement was therefore void. It then follows that the defendants' conversion of RRM's funds to their own purposes in 1990 was unlawful, and this conversion occurred within five years before the defendants were indicted. We therefore reject the defendants' argument as being out of step with the charges and the jury's findings.

B.

The defendants next argue that 18 U.S.C. § 1162 (1988), commonly known as Public Law 280, strips the federal government of jurisdiction over the crimes charged in the indictment, giving jurisdiction instead to the state. The Magistrate Judge[5] rejected this argument in a lengthy opinion addressing the defendants' pretrial motions. See United States v. Finn, 919 F. Supp. 1305, 1330-38 (D. Minn. 1995) (report and recommendation), adopted, United States v. Finn, 911 F. Supp. 372 (D. Minn. 1995); United States v. Pemberton, 911 F. Supp. 375 (D. Minn. 1995); United States v. Brown, 911 F. Supp. 375 (D. Minn. 1995). We agree.

We need not explore the defendants' argument at length, for it is foreclosed by our recent decision in United States v. Stone, 112 F.3d 971 (8th Cir. 1997). In Stone, which involved a violation of the Airborne Hunting Act., 16 U.S.C. § 742j-1, we held that Public Law 280 does not divest the federal government of jurisdiction over all criminal matters occurring in Indian country. See Stone, 112 F.3d at 973. Rather, we held, Public Law 280 transfers from the federal government to the state of Minnesota jurisdiction over only those crimes encompassed by 18 U.S.C. §§ 1152 and 1153.[6] See id. Crimes of general applicability--that is, actions that Congress has declared illegal regardless of where they occur--are not affected by the enactment of Public Law 280 and remain within the subject-matter jurisdiction of the federal

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[5] The Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

[6] Section 1152 "extends to Indian country federal enclave jurisdiction over crimes in which the situs of the offense is an element." Stone, 112 F.3d at 973. Section 1153 makes unlawful certain enumerated offenses, including murder, kidnapping, and burglary, committed by an Indian in Indian country. See 18 U.S.C. § 1153.

courts. See id.; cf. Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974) (discussing crimes of general applicability), cert. denied, 420 U.S. 978 (1975); Felix S. Cohen, Handbook of Federal Indian Law 366 n.156 (Rennard Strickland et al. eds., 1982 ed.) (citing examples of federal laws unaffected by Public Law 280). Because all of the crimes with which the defendants were charged are crimes of general applicability, the defendants' challenge to the District Court's jurisdiction fails.[7]

C.

We next consider several arguments raised by Finn, all of which concern claims of prosecutorial misconduct. For the most part, these arguments are tangentially related to a dispute that arose during the government's investigation of this case and the obstruction-of-justice charges against Finn that resulted. The key document involved in this dispute is an invoice in the amount of $7600 sent by RRM to the LLRBC for additional insurance services; when Finn received payment from the LLRBC, he paid the same amount to the executive director of the LLRBC, Myron Ellis. According to sworn statements of Ellis and the LLRBC's accountant, when a grand jury subpoenaed documents from the Band in 1991, Finn told the accountant to destroy the invoice. The Band eventually turned over another copy of the invoice in response to a 1993 subpoena. The kickback allegedly paid to Ellis was the basis of the 1994 misdemeanor charge against Finn, and Finn's order to the accountant to destroy the invoice was the justification

[7] Finn suggests that the crime of theft or misapplication of tribal funds is a "uniquely Indian" offense rather than a crime of general applicability. Finn Br. at 27 n.43. We disagree, for 18 U.S.C. § 1163 forbids stealing from a tribe anywhere in the country. See United States v. McGrady, 508 F.2d 13, 16 (8th Cir. 1974), cert. denied, 420 U.S. 979 (1975).

for an obstruction-of-justice sentence enhancement that caused him to withdraw his guilty plea to the misdemeanor. Finn was later charged with a substantive count of obstruction of justice in the 1995 indictment, but this charge was dismissed by the government during trial.

Finn first argues that the government's decision to charge him with multiple felonies after he withdrew his guilty plea to a misdemeanor constituted vindictive prosecution. As Finn frames the issue, the government retaliated against him for his exercise of "a legal right." Finn Br. at 13.[8] Finn has adduced no evidence of actual vindictiveness on the part of the government; accordingly, his claim can succeed only if it is proper to presume vindictiveness from the circumstances. The government seeks to clarify the circumstances by pointing out that the misdemeanor plea resulted from a plea bargain and that Finn was warned that he could be charged with more serious crimes if he insisted on going to trial. Although we have no reason to disbelieve the government, we need not venture outside the record to determine that Finn's argument must be rejected. "[T]he mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." United States v. Goodwin, 457 U.S. 368, 382-83 (1982); see also Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (holding that prosecutor's threatening more serious charges if defendant does not plead guilty does not violate due process). Accordingly, we do not presume vindictiveness in this case, and Finn's argument fails to carry the day.

Finn also complains that an agent of the Department of the Interior perjured himself before the grand jury by stating that the Band never turned over the invoice in response to

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[8] Finn does not identify what "legal right" he exercised, but we will assume he is referring to his right to a trial by jury.

subpoenas. This argument is meritless for several reasons. First, "an indictment returned by a legally established and unbiased grand jury 'is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence.'" United States v. Roach, 28 F.3d 729, 739 (8th Cir. 1994) (quoting United States v. Calandra, 414 U.S. 338, 345 (1974)). Second, even if we consider the merits of the argument, any prejudice to Finn from this testimony was dissipated when the obstruction charge was dismissed during trial. In fact, because the defendants cross-examined the agent thoroughly at trial and exposed his failure to discover the copy of the invoice among the documents turned over to the grand jury in 1993, the incident probably caused more damage to the government's case than it did to Finn's defense.

Finn next argues that the government's mention of the obstruction-of-justice allegations in its opening statement was improper. As best as we can tell, Finn appears to be arguing that because the government discovered that the invoice had not been destroyed, it should have abandoned the obstruction charge before the trial began. As the District Court found when Finn made a similar argument in the guise of a Brady claim, however, the fact that a copy of the invoice survived does not show that Finn did not order the accountant to destroy it. Nothing in Finn's argument shows a lack of good faith on the part of the prosecutor, see United States v. Wallace, 453 F.2d 420, 422 (8th Cir.) (noting that prosecutor's good faith is controlling question), cert. denied, 406 U.S. 961 (1972), and the court instructed the jury that opening arguments are not evidence. As a result, we are unable to conclude that the government's mention of the obstruction evidence amounts to misconduct.

Finally, we consider Finn's objection to the testimony of one of the government's expert witnesses. At trial, an IRS agent testified that a particular financial transaction conducted by Finn constituted money laundering. After a bench

conference, the District Court struck the testimony and instructed the jury to disregard it; the court repeated this instruction during the final jury charge. Finn suggests that expert testimony that a defendant committed a crime is invariably improper, citing Federal Rule of Evidence 704(b). That rule, however, prohibits only testimony on the issue of mens rea, while Rule 704(a) permits testimony on any other issue even if "it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a); see also United States v. Posters 'N' Things Ltd., 969 F.2d 652, 661 n.6 (8th Cir. 1992) (permitting expert to testify that particular elements of money laundering were established), aff'd, 511 U.S. 513 (1994). We need not determine exactly how Rule 704 should apply in the instant case--a difficult question, because an opinion that the defendant committed a crime may include a suggestion that he or she had the requisite mental state--although we suggest that a cautious prosecutor should avoid eliciting from a witness an answer to this ultimate question. Cf. United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993) (holding that expert may not testify that child was sexually abused because opinion is not helpful to the jury). In this case, Finn was acquitted of all the money-laundering charges, curing any direct prejudice to him, and we conclude that any spillover prejudice to Finn on the other charges in the indictment was adequately cured by the court's repeated instruction to the jury to disregard the testimony.

III.

We now turn to several issues raised by Pemberton and Brown, including their arguments that the evidence is insufficient to support their convictions. When we examine the sufficiency of the evidence, we consider the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the verdict, and we will reverse only if

no reasonable jury could have found the defendants guilty beyond a reasonable doubt. See United States v. Stands, 105 F.3d 1565, 1570 (8th Cir. 1997), petitions for cert. filed, Nos. 96-9316, 96-9420, 96-9541 (U.S. June 5, 17, 18, 1997).

A.

We deal first with Pemberton's challenge to the sufficiency of the evidence. In addition to conspiracy, Pemberton was convicted of two substantive counts relating to the disbursement of the funds of RRM as the company was wound up in June 1990. Pemberton argues that he was merely a pawn of Finn, the mastermind of the RRM scheme, and that he had no knowledge that RRM was a scam; his payout in 1990, he says, was merely a fair return on his legitimate investment in RRM in 1987. This is, of course, one possible interpretation of the facts, but it is the interpretation most favorable to Pemberton, not the one most favorable to the verdict. As in many cases, there is little direct evidence of Pemberton's knowledgeable participation in the conspiracy and the distribution of the proceeds of RRM, but the jury was entitled to rely on the significant circumstantial evidence indicating that Pemberton knew Finn was defrauding the Band and that he joined in Finn's efforts to do so. See United States v. Jewell, 893 F.2d 193, 194 (8th Cir. 1990) (recognizing that knowledge and intent may be established by circumstantial evidence). The jury could have considered, for example: (1) that Pemberton created a conflict of interest by investing in RRM while he was secretary-treasurer of the LLRBC; (2) that Finn's notes from the first RRM board meeting show that the "Leech Lake agreements" were discussed while Pemberton was present; (3) that Pemberton, along with White, signed a letter authorizing one of the LLRBC's banks to transfer to RRM the $30,000 that was used to purchase shares for Pemberton and Brown in RRM; (4) that the auditor for the

Department of the Interior directed several letters to Pemberton expressing concerns about the relationship between the LLRBC and RRM; (5) that Pemberton signed the representation letter stating that no LLRBC officials stood to profit from RRM; and (6) that Pemberton's "investment" of $18,000 (assuming that the money was even his to invest) more than tripled in about three years, when it was obvious that his profits could have come only at the expense of the LLRBC, of which he was an officer.

Reasonable jurors could disagree about whether Pemberton conspired with his co-defendants and intentionally stole from his fellow tribal members. Nevertheless, the jurors before whom Pemberton was tried did not disagree, and we cannot say that no reasonable juror could have found him guilty. See United States v. Weston, 4 F.3d 672, 674 (8th Cir. 1993) ("[I]f the evidence rationally supports two conflicting hypotheses, we cannot disturb the conviction.").

B.

Brown, who was convicted on the conspiracy count only, presents a closer case on the sufficiency question, but much of the circumstantial evidence that suffices to support Pemberton's conviction is equally probative of Brown's participation in the conspiracy. In particular, Brown's signature on the auditor's representation letter, which contained the false statement that no LLRBC officials would share in RRM's profits, reasonably could lead the jury to the inference that Brown intended to mislead the auditor and the Interior Department. Brown suggests that he did not know that the statement was false, but the jury quite reasonably could have determined that, as a director and shareholder of RRM, he was well aware of his financial interest in the company.

C.

The government also presented a theory of "willful blindness" regarding Pemberton's and Brown's knowledge of and participation in the conspiracy. Brown does not challenge the substance of the District Court's instruction on the willful-blindness issue, but he does take issue with the manner in which the court decided to give the instruction. We conclude that the District Court erred, but the error was not prejudicial.

In examining this claim, we must consider the rather unusual happenings as the trial came to a close. Although the record is not entirely clear, the parties agree that the court ruled at the instruction conference that it would give a willful-blindness instruction. When the parties returned to the courtroom the following morning to begin closing arguments, the court told counsel that it had determined that the instruction was not appropriate and that it would not be given. The government and Finn then presented their arguments, and the court recessed for lunch. After lunch, the court informed counsel that it had changed its mind again and would give the willful-blindness instruction.[9] When Brown objected, the court ruled that the government would not be permitted to argue willful blindness in its rebuttal unless Brown raised the issue in his closing argument. Brown then proceeded with his argument, avoiding the subject, and the government did not argue it in rebuttal.

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[9] Brown suggests that the District Court's decision to give the instruction was influenced by the misconduct of Finn's counsel during his closing argument. Neither the record nor common sense supports this claim. There is no reason to believe that the court would seek to punish Brown and Pemberton for the misdeeds of Finn's attorney, and no one suggests that the instruction was intended to punish Finn, since the willful-blindness theory could not plausibly have applied to him. The court's reprimand of Finn's attorney properly included cautionary language that the jury should not hold the reprimand against any of the defendants, including Finn himself.

Federal Rule of Criminal Procedure 30 provides that "[t]he court shall inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury." The District Court clearly violated this rule by changing its mind about the instruction in the midst of closing arguments. Nevertheless, a violation of Rule 30 is not reversible error unless the complaining defendant is prejudiced by the error. See, e.g., Eisen, 974 F.2d at 256; United States v. Horton, 921 F.2d 540, 547 (4th Cir. 1990), cert. denied, 501 U.S. 1234 (1991); United States v. Gaskins, 849 F.2d 454, 458 (9th Cir. 1988); United States v. Smith, 629 F.2d 650, 653 (10th Cir.), cert. denied, 449 U.S. 994 (1980); cf. United States v. Dawson, 467 F.2d 668, 675 (8th Cir. 1972) (affirming conviction where defendant was alerted that instruction would probably be given), cert. denied, 410 U.S. 956 (1973). For this purpose, a defendant is prejudiced if he is "unfairly prevented from arguing his defense to the jury or [is] substantially misled in formulating his arguments." Smith, 629 F.2d at 653. No such prejudice exists in this case.

Brown argues that he was prejudiced because the government would have been permitted to respond if he had argued the willful-blindness issue. Of course, the government would have been permitted to respond to Brown's arguments in any event, regardless of when the District Court ruled on the instructions, because the government is entitled to the last word in rebuttal. See Fed. R. Crim. P. 29.1. The District Court's ruling that the government could not argue the issue in rebuttal unless Brown opened the door prejudiced no one but the government.[10] Nor was Brown misled in formulating his

[10] Brown also suggests that he should have been given an opportunity for surrebuttal on the issue. This argument makes no sense, for even if the District Court had followed the proper procedure and finalized the instructions before the government began closing arguments, Brown would not have been entitled to speak twice on any issue.

argument, for the District Court had indicated at the instruction conference the previous day that the instruction would be given. Counsel for Brown could have been misled only if he prepared his argument after the court first changed its mind--that is, if counsel had prepared his argument during the closing arguments of the government and Finn. Brown does not suggest that this was the case, and we think it entirely unlikely. Accordingly, because Brown was not prejudiced by the District Court's violation of Rule 30, the error does not entitle him to a new trial.

IV.

We now consider several arguments proffered by Finn. Before considering some of Finn's more substantial arguments in detail, we pause to reject several other arguments briefly. What we have written already with respect to Pemberton's and Brown's conspiracy convictions is sufficient to demonstrate our belief that the government presented sufficient evidence to convict Finn of conspiracy. Nor is there merit in Finn's contention that 18 U.S.C. § 1346, which broadened the scope of the mail and wire fraud statutes following the Supreme Court's decision in McNally v. United States. 483 U.S. 350 (1987), cannot be applied to a conspiracy that began before the statute was enacted and continued after its enactment. This argument is foreclosed by United States v. Blumeyer, 114 F.3d 758, 766 (8th Cir. 1997), and United States v. Garfinkel, 29 F.3d 1253, 1259 (8th Cir. 1994). Finally, Finn (along with his codefendants at times) argues repeatedly that because there was insufficient evidence to convict him of one or another of the substantive charges against him, his conspiracy conviction, which resulted from a general verdict on a charge that he conspired to commit several substantive crimes, must also be reversed. We disagree. Finn's argument contains two significant flaws. Not only is it quite possible and permissible

for a defendant to be convicted of conspiring to commit an offense and to be acquitted of that same substantive offense, see United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir.), vacated in part on other grounds, 856 F.2d 1189 (8th Cir. 1988) (en banc), cert. dismissed, 499 U.S. 944 (1991), but also the Supreme Court has held explicitly that the failure of proof on one of several alternative conspiratorial objects does not void the conspiracy conviction if the proof is sufficient as to any one of the objects of the conspiracy, see Griffin v. United States, 502 U.S. 46, 56-57 (1991). We conclude that Finn's attack upon his conspiracy conviction lacks merit.

A.

Finn challenges the sufficiency of the indictment with respect to the charges that he violated 18 U.S.C. § 666 by stealing from a program receiving federal funds. Finn argues that the indictment did not allege that he was an agent of the Band on the dates on which he was accused of converting the Band's property and that the District Court should have granted his pretrial motion to dismiss the § 666 charges on this ground. Although we agree with Finn that agency is an element of a § 666 offense, see 18 U.S.C. § 666(a)(1), (d)(1), we believe that the indictment does sufficiently charge that Finn was the Band's agent on the relevant dates. (We also note that the District Court's jury instruction on this point was correct.)

> An indictment is sufficient if it (1) contains the elements of the charged offense and fairly informs the defendant of the charge against which he or she must defend and (2) enables him or her to plead double jeopardy as a bar to further prosecution. . . . Unless the indictment is so defective that by no reasonable

> construction can it be said to charge the offense for which the defendant[] [was] convicted, we will uphold it.

Stands, 105 F.3d at 1575 (citations omitted). When the issue is whether an element of an offense has been omitted, our inquiry is whether the omission is one of substance or one of form only. See United States v. Mallen, 843 F.2d 1096, 1102 (8th Cir.), cert. denied, 488 U.S. 849 (1988).

Finn correctly notes that the § 666 counts contain no language expressly informing him that the government would be required to prove that he was an agent of the Band. Three factors, however, when considered in combination, make the indictment sufficient nonetheless. First, the § 666 counts cite the statute, which clearly makes agency an element of the offense. Finn points out that we held in United States v. Camp, 541 F.2d 737, 740 (8th Cir. 1976), that a reference to the relevant statute cannot supply an element omitted by the grand jury. This case is distinguishable from Camp, however, because of other relevant allegations made by the grand jury. The introductory section of the indictment, which the indictment incorporates by reference into all of the counts, alleges that Finn was the Band's attorney "from on and about 1983 to June, 1, 1990." Grand Jury Indictment at 3. Although all of the § 666 offenses were alleged to have occurred between June 13 and July 5, 1990, the use of "on or about" (which is what we must assume the grand jury meant when it said "on and about") in an indictment incorporates dates "within a reasonable time of the date specified." United States v. Duke, 940 F.2d 1113, 1120 (8th Cir. 1991). The indictment further alleges that the same acts by Finn that violated § 666 also violated 18 U.S.C. § 1163, and in the § 1163 counts, the indictment alleges that Finn was an agent of the Band on the relevant dates. In these circumstances, it is apparent that the grand jury's omission was one of form rather

than substance, and so Finn's challenge to the sufficiency of the indictment must fail.

B.

Finn next argues that the government did not prove that RRM was an "Indian tribal organization" for purposes of 18 U.S.C. § 1163. We disagree.[11]

Whether an entity is an Indian tribal organization is a question for the jury to decide. See United States v. White Horse, 807 F.2d 1426, 1429 (8th Cir. 1986). In White Horse, the relevant organization was a telephone authority chartered pursuant to tribal law and wholly owned by the tribe. We reversed the defendants' convictions because the district court erred by instructing the jury that the telephone authority was an Indian tribal organization as a matter of law, but we refused to grant the defendants judgments of acquittal. See id. at 1430-31 & n.2. In other words, we necessarily concluded in White Horse that the government had presented sufficient evidence to show that the authority was a tribal organization, but we reversed because the wrong factfinder made the decision. Nearly identical evidence was presented in the instant case. RRM was established under tribal authority as a subordinate body politic of the LLRBC. We find it difficult to believe that any corporation established under tribal law as a sub-entity of a tribe would not be an Indian tribal organization (although it remains, of course,, a jury question), and Finn surely has not made such a case for RRM.

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[11] We do not necessarily need to reach this issue, as the indictment also charged Finn with stealing from the Band, which is undoubtedly an Indian tribal organization. See 18 U.S.C. § 1163 (including "any tribe, band, or community of Indians" within definition). Out of an abundance of caution, however, and because Finn's argument raises an important issue regarding the status of tribally-chartered entities, we will consider the status of RRM.

Nor do we find persuasive Finn's argument that United States v. Zephier, 916 F.2d 1368 (8th Cir. 1990), controls in this case. Zephier involved a school founded by fifteen tribes and organized as a charitable corporation under state law. See id. at 1369-70. We explicitly noted the state-law character of the corporation when we laid out several factors indicating that a state-law corporation may be an Indian tribal organization, including the factor that Finn now emphasizes: "the entity must be patterned after or deliberately have conformed its operations to federal laws for Indian affairs Id. at 1372. We do not believe that the government is required to meet this element of Zephier in the case of a corporate subsidiary chartered by a tribe; in fact, the requirement does not especially make sense in the context of RRM. Federal laws governing Indian affairs do not necessarily have anything to do with a corporation founded pursuant to tribal authority. Because tribal law gives the corporation its legal existence, a corporation chartered under tribal law necessarily has a closer legal relationship with the tribe than does a state-chartered corporation that is merely controlled by one or more tribes. Accordingly, we believe that the only relevant factor for the jury's consideration in the case of a corporation chartered under tribal authority is the degree of control over the corporation possessed by the tribe. See id. (outlining four factors relevant to determination of "de facto control"); White Horse, 807 F.2d at 1430 ("[T]he Telephone Authority constituted an Indian tribal organization if there was a sufficient nexus between the Tribe and the Telephone Authority."). Although Finn argues that in fact he had full control of RRM, he does not seriously dispute that the Government established a sufficient nexus between the Band and RRM. We conclude that the government's evidence sufficiently supports the jury's finding that RRM was an Indian tribal organization.

C.

Finally, we consider Finn's challenge to his mail-fraud convictions. Here Finn argues that the mailings did not further his scheme to defraud the Band and the state of Minnesota. Again, we disagree.

The mail-fraud charges relate to two of Finn's boat purchases. Finn bought a twenty-foot boat in 1987 with RRM funds and registered it in the name of Finn & Mattson, his law partnership. Three years later, Finn bought a twenty-one-foot boat with RRM funds laundered through the LLRBC; he registered this boat in his own name. Minnesota passed a statute in 1989 requiring many boats, including the two boats at issue here, to have certificates of title beginning January 1, 1991. See Minn. Stat. §§ 86B.820 to -.920 (1996). After the law took effect, Finn applied for certificates of title for both boats, and the state sent the certificates to him through the mail.

Finn argues first that the Government cannot premise one of his mail-fraud convictions on the sales-tax return that was filed by the dealer that sold him the twenty-one-foot boat in 1990. The dealer that sold the boat testified that because Finn indicated that he was purchasing the boat on behalf of the LLRBC, he did not charge Finn sales tax on the purchase and he did not submit sales tax to the state. Finn nevertheless argues that the dealer's sales-tax return was not false because, according to the testimony of one of Finn's witnesses, the return did not report the sale of the boat as a sale to an exempt entity. This argument is irrelevant, for an innocent mailing--that is, a mailing that is entirely true--may satisfy the mailing element of a mail-fraud conviction. See Schmuck v. United States, 489 U.S. 705, 715 (1989); United States v. Ribaste, 905 F.2d 1140, 1142 (8th Cir. 1990). In any event, the jury reasonably could have believed the proprietor, who testified that he did not pay the tax to the state.

Finn presents a better argument with respect to the other two counts of mail fraud. These counts were premised on the state's mailing of certificates of title to Finn after the passage of the new statute. Finn argues that because these mailings were not "part of the execution of the scheme as conceived by the perpetrator at the time," Schmuck, 489 U.S. at 715, they cannot support mail-fraud convictions. We will accept Finn's version of events and assume that he was entirely unaware that certificates of title might be required some time after he purchased the boats, although we suspect that an attorney and sportsman such as Finn was probably aware of the titling statute, which was passed in 1989, when he bought the twenty-one-foot boat in 1990. On Finn's theory, the fraud was complete once he registered the boat in his name (or the name of his partnership), because he could then transfer title merely by signing over the registration card to a purchaser.[12] Finn argues that the state's subsequent requirement that he obtain a certificate of title was not foreseeable and that his receipt of titles through the mail did not further his fraud in any way.

We think Finn's view of the situation is overly simplistic. For starters, the language in Schmuck that the mailing must be "part of the execution of the scheme as conceived by the perpetrator at the time" is directed to a different issue: what might be called an "inculpatory" mailing. Schmuck argued that the mailings for which he was convicted (certificates of titles to cars that he had sold after rolling back their odometers) actually worked against him by increasing the risk that he would be caught. See id. The Court rejected his

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[12] We simplify matters a bit when we say that "the fraud was complete." In fact, as the government points out, the indictment alleged that all of Finn's RRM-related actions from 1985 on were a part of his scheme to defraud. Our statement that the fraud was complete is really a simpler way of saying that the mailings could not have furthered the fraud because Finn had already obtained complete control of the boats.

argument, holding that it is irrelevant "whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." Id. Finn's case is a bit different: here, Finn believed he had successfully defrauded the Band, but then a change in state law required him to take another step if he wished to retain the fruits of his fraud or convert them to cash. Given the change in the law, the mailings in the instant case increased the chances that Finn's fraud would be successful, for they enabled him to present a purchaser with prima facie proof of title in a new and official form. Finn's mailings, therefore, are not the inculpatory sort of communications envisioned in Schmuck; they are communications that he did not foresee but that he nevertheless was required to make in order to continue the fraud. Finn suggests no authority that a mailing of this type may not suffice to support a mail-fraud conviction, and we see no reason why such a mailing should not be adequate.

In essence, Finn seems to be arguing that a defendant who has successfully fleeced his victim and gained possession and control of the victim's property may not be convicted of mail fraud based on subsequent mailings. This is not the law. See United States v. Lane, 474 U.S. 438, 451-52 (1986) ("Mailings occurring after receipt of the goods obtained by fraud are within the statute if they 'were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'") (quoting United States v. Maze, 414 U.S. 395, 403 (1974)). Ultimately, Whether a mailing furthers a scheme to defraud is a factual question for the jury to decide. See United States v. Freitag, 768 F.2d 240, 244 (8th Cir. 1985). The jury in the instant case reasonably could have found that, given the change in the law, the titles mailed to Finn at his request furthered his scheme to defraud the Band of its property.

V.

We have considered the defendants' numerous remaining arguments, including those challenging their sentences, and have concluded that they are without merit. Accordingly, the judgments of the District Court are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
Fifth Division - District of Minnesota

UNITED STATES OF AMERICA

v. Case Number CR 5-95-12(1)

HAROLD R. "SKIP" FINN
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, HAROLD R. "SKIP" FINN, was represented by Douglas A. Kelley and Steven E. Wolter.

The defendant has been found not guilty on count(s) 3, 8, 9, 12, 15, 16, 17, 18, 19, 26 and is discharged as to such count(s).

The defendant was found guilty on count(s) 1, 2, 4, 5, 7, 10, 11, 13, 14, and 20-22 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Defraud the United States	October 1993	1
18 USC 666(a)(1)(B) and 18 USC 666(a)(2)	Conspiracy to Commit Theft and Bribery Concerning Programs Receiving Federal Funds	October 1993	1
18 USC 1163	Conspiracy to Commit Embezzlement, Theft and Misapplication of Tribal Funds	October 1993	1
18 USC 1341	Conspiracy to Defraud the Leech Lake Band and State of Minnesota	October 1993	1
18 USC 1163	Theft and Misapplication of Tribal Funds	June 13, 1990	2
18 USC 1163	Theft and Misapplication of Tribal Funds	June 18, 1990	4
18 USC 1163	Theft and Misapplication of Tribal Funds	June 25, 1990	5
18 USC 1163	Theft and Misapplication of Tribal Funds	July 5, 1990	7
18 USC 666	Theft Concerning a Program Receiving Federal Funds	June 13, 1990	10
18 USC 666	Theft Concerning a Program Receiving Federal Funds	June 18, 1990	11
18 USC 666	Theft Concerning a Program Receiving Federal Funds	June 25, 1990	13
18 USC 666	Theft Concerning a Program Receiving Federal Funds	July 5, 1990	14
18 USC 1341, 1346 and 2	Mail Fraud	June 13, 1990	20
18 USC 1341, 1346 and 2	Mail Fraud	January 15, 1993	21
18 USC 1341, 1346 and 2	Mail Fraud	July 30, 1993	22

As imposed on September 5, 1996, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Defendant: HAROLD R. "SKIP" FINN
Case Number: CR 5-95-12(1)

It is ordered that the defendant shall pay to the United States a special assessment of $ 600.00, for count(s) 1, 2, 4, 5, 7, 10, 11, 13, 14, 20, 21, 22, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and Special assessments imposed by this Judgment are fully paid.

Dated: September 16, 1996

/S/
MICHAEL J. DAVIS, Judge
United States District Court

Defendant's Soc. Sec. No: 469-58-0743
Defendant's Date of Birth: 10/27/48
Defendant's address: P.O. Box 955; Cass Lake, MN 56633

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3527MNST

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
v.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Harold Finn, etc.,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 22, 1997

Order Entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

INTERVIEW OF HARTLEY WHITE

On March, 11, 1992, Hartley WHITE, HCR1, Box 410, Longville, Minnesota 56655, was interviewed regarding his knowledge of Reservation Risk Management (RRM) Inc. WHITE was interviewed at his residence by S/A James V. HANBURY. WHITE stated substantially as follows:

He served as Chairman of the Leech Lake Reservation Business Committee (LLRBC), from 1976, through 1988. His social security number is 471-20-0739, and his date of birth is February 10, 1925, and his home telephone number is (218) 363-2635.

RRM was established sometime during approximately 1985, and RRM was a tribal entity which provided insurance to the LLRBC. Tom PETERSON of the Twin City Insurance Group, and John McCARTHY, Assistant Director, LLRBC, played some role in the establishment of RRM. Harold "Skip" FINN, who then served as legal counsel for the LLRBC was also involved in the establishment of RRM. To his knowledge, FINN created the insurance policy and other documents concerning RRM. Dan BROWN, who then served as a member of the LLRBC bought into RRM as did Alfred PEMBERTON and McCARTHY.

He had no knowledge regarding the terms or limitations of RRM's policy nor did he have any knowledge concerning the coverage provided by RRM or the premiums which were paid to RRM by the LLRBC.

He was shown and requested to examine a LLRBC resolution No. 86-26. He was not aware of the resolution but he was aware of some of the contents, however, he claimed that the

signature Hartley WHITE appearing at the bottom of this document was not his signature.

He was shown and requested to examine a copy of RRM shareholders agreement and after reviewing the document stated the signature Hartley WHITE appearing at the end of this document may or may not be his signature. He did not review this document prior to being shown the document for purposes of this interview.

He was shown and requested to examine a preorganization subscription agreement for RRM, he did identify the signature Hartley WHITE appearing at the end of this document as his signature although he did not recall reviewing the document prior to seeing it on the date of this interview. He was asked by FINN and McCARTHY if he wanted to buy shares of RRM stock and he indicated to them that no he did not wish to purchase any shares.

Interview (X) Records ( ) Investigative Operation ( )
conducted on March 11, 1992 .....
at Longville, Minnesota, by S/A James V. Hanbury .....
OIG File No. 91 VT 408

FINN told him the money which RRM would use to pay claims would come from RRM's investment of the premiums which they received from LLRBC.

He has no knowledge as to how much money if any FINN, PEMBERTON or BROWN received from RRM.

He was shown and requested to examine a RRM debenture agreement dated December 1, 1985. He had never seen this document prior to the date of this interview nor was he aware of its contents.

It was his understanding that anyone who bought into RRM would have benefited from the money which would have been left over at the time when RRM was dissolved. It was his understanding that the primary beneficiaries of that money would have been the law firm of FINN and MATTSON.

All of the discussions he had with FINN, MATTSON, PEMBERTON and McCARTHY regarding RRM were discussed with him privately and were not discussions which took place at LLRBC meetings. The only discussions that he had with anyone regarding RRM was when RRM first began doing business with the LLRBC sometime in approximately 1985. If he had known FINN received loans from RRM and had not repaid the money he would have "been on him for stealing money from his people".

In regard to the Dutchman's Supper Club, WHITE advised that FINN donated this property as a gift to the LLRBC approximately two years ago. He bases this knowledge on discussions which he had with various tribal leaders. He asked McCARTHY and FINN who was benefiting from the LLRBC money paid to RRM, and they never answered him. He does not recall the date when this question occurred. According to WHITE, McCARTHY was involved in some manner in running FINN's senatorial campaign.

At the conclusion of the interview he provided some handwriting exemplars of his signature, Hartley WHITE.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**INFORMATION**
v.	)	
HAROLD "SKIP" FINN and MYRON F. ELLIS,	)	(18 U.S.C. § 1163) (18 U.S.C. § 2)
Defendants.	)	

THE UNITED STATES ATTORNEY CHARGES THAT:

COUNT I

(Misapplication of Tribal Funds)

From on or about August 15, 1988 to on or about August 24, 1988, in the State and District of Minnesota, the defendants,

HAROLD "SKIP" FINN and
MYRON F. ELLIS,

each aiding and abetting the other, did willfully misapply not more than $100 of the monies or funds of the Leech Lake Band of the Minnesota Chippewa, an Indian tribal organization, in that the defendants knowingly submitted and arranged for the payment by the Leech Lake Band of a fictitious invoice for insurance services from Reservation Risk Management, Inc. in the amount of $5,745.14; whereas in

fact, as the defendants then knew, such insurance services had not been provided and the $5,745.14 was for the personal benefit of Mr. Myron F. Ellis, then a member of the Leech Lake Reservation Business Committee; all in violation of Title 18, United States Code, Sections 1163 and 2.

Dated: August 12, 1994

DAVID L. LILLEHAUG
United States Attorney

/S/
BY: MICHAEL W. WARD
Assistant U.S. Attorney
Attorney ID No. 190755

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-94-18

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	PLEA AGREEMENT
v.	)	AND SENTENCING
	)	STIPULATIONS
HAROLD "SKIP" FINN,	)	
	)	
Defendant.	)	

The parties to the above captioned case, the United States of America, by its attorneys, David L. Lillehaug, United States Attorney for the District of Minnesota, and Michael W. Ward, Assistant United States Attorney, and the defendant, Harold "Skip" Finn, through his attorney, Douglas A. Kelley, Esquire, hereby agree to resolve this case on the following terms and conditions:

FACTS

1. The United States and the defendant agree that in 1988 the defendant, Harold "Skip" Finn, was an officer and director of Reservation Risk Management Inc., a tribally chartered corporation organized to provide insurance and insurance administrative services in connection with the Leech Lake Band's modified self-insurance plan. At all times herein, the Leech Lake Band of the Minnesota Chippewa was and is an Indian Tribal organization. The United States and the

defendant agree that on or about April 28, 1988 and again on or about August 16, 1988 the defendant knowingly submitted to the Leech Lake Band fictitious invoices for insurance services he claimed to have provided to the Leech Lake Band when, as he then well knew, such services had not been provided. By such actions the defendant willfully caused to be misapplied funds belonging to the Leech Lake Band in the amount of $7,600 in April 1988 and $5,745.14 in August 1988. The parties agree that the defendant's actions as described above constituted a violation of Title 18, United States Code, Section 1163.

PLEA AGREEMENT

2. The defendant agrees to plead guilty to the single count of the Information filed by the United States charging the defendant with willfully misapplying not more than $100 of the funds of the Leech Lake Band, an Indian tribal organization, all in violation of 18 U.S.C. § 1163.

3. The defendant further agrees to continue to waive his right to plead the five-year statute of limitations in defense of any prosecution for the conduct described above until 30 days after the Court has either unconditionally accepted or rejected this agreement.

4. The defendant understands that the maximum statutory penalties for the offense charged in the Information is as follows:

(a) a term of imprisonment of up to one (1) year;

(b) a criminal fine of up to $100,000; and

(c) a term of supervised release of one (1) year.

5. The defendant understands that because the offense conduct occurred after November 1, 1987, he will be sentenced in accordance with the Sentencing Guidelines promulgated under the Sentencing Reform Act of 1984.

6. The parties agree to the following facts relevant to an assessment of the offense under the Sentencing Guidelines:

a) The base offense level for Count I of the Information (18 U.S.C. § 1163) is level four (4) pursuant to Guideline Section 2B1.1(a).

b) The stipulated amount of loss for sentencing purposes is $13,345.14 ($7,600 and $5,745.14). This amount of loss requires an increase in the offense level of five (5) levels pursuant to Guideline Section 2B1.1(b)(1)(F). (Note: this stipulated loss figure is for purposes of establishing the adjusted offense level only. The United States will present to the court prior to sentencing evidence of other conduct by the defendant relevant to the operation of Reservation Risk Management that the United States contends was a motive for the offense of conviction.)

c) The offense of conviction involved the submission by the defendant of fictitious invoices to the Leech Lake Band for the purpose of funneling payments through Reservation Risk Management, Inc. to a member of the Leech Lake Reservation Business Committee. The parties agree that the offense involved more than minimal planning and requires a two (2) level increase in the offense level pursuant to Guideline Section 2B1.1(b)(4).

d) If the defendant pleads guilty to the charges in the Information and cooperates with the U.S. Probation Office, the defendant would be entitled to a two (2) point reduction for acceptance of responsibility pursuant to Guideline Section 3E1.1.

e) The parties have reached no other agreements relevant to specific offense characteristics and adjustments under the Sentencing Guidelines.

7. Based on the information currently in the possession of the United States, the parties believe that the defendant's criminal history category is I. If the Court determines that the adjusted offense level is nine (9) and that criminal history category I is appropriate, the resulting guideline sentencing range would be a term of imprisonment of 4-10 months.

8. The defendant further agrees to pay a criminal fine in the amount of no more and no less than one hundred thousand dollars ($100,000). Such fine is to be paid by the defendant no later than the date of sentencing and in the form of a bank cashier's check. Separate and apart from the criminal fine stated above, the defendant agrees to pay, on the date of sentencing, the mandatory special assessment of $25.00.

9. The defendant Agrees that the above recommendations of the parties regarding the sentencing factors are not binding on the Court. The defendant reserves the right to withdraw his guilty plea if the Court finds that the adjusted offense level is higher than level ten (10). In addition, notwithstanding the calculation of the adjusted offense level, the United States reserves the right to ask the Court to impose the maximum statutory penalty of twelve (12) months imprisonment, and the defendant reserves the right to ask the Court to impose a probationary sentence.

10. The foregoing provisions set forth the entire plea agreement between the parties and no other agreements or promises have been made.

Respectfully submitted,

Dated: August 12, 1994

DAVID L. LILLEHAUG
United States Attorney

/S/
BY: MICHAEL W. WARD
Assistant U.S. Attorney
Attorney ID No. 190755

Dated: Aug. 17, 1994

/S/
DOUGLAS A. KELLEY
Attorney for Defendant

Dated:

/S/
HAROLD FINN
Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-94-18(1)

UNITED STATES OF AMERICA	)
Plaintiff,	)
v.	) UNITED STATES' MEMORANDUM CONCERNING REMAINING DISPUTED SENTENCING FACTORS
HAROLD R. "SKIP" FINN,	)
Defendant.	)

On August 17, 1994, the defendant pleaded guilty to preparing and submitting over $13,000 of false insurance invoices to the Leech Lake Band. The funds were then improperly diverted to co-defendant Myron Ellis, who was a high ranking member of the Leech Lake Band tribal government. At the time of the offense, the defendant was the Leech Lake Band's own attorney, and he used his position as the administrator of the tribal "self-insurance" plan to carry out the fictitious invoice and "kickback" scheme.

In its presentence report to the Court, the United States Probation Office has recommended that the defendant's sentence be increased beyond the base guideline sentence range because, as an attorney, the defendant abused a position of trust and special skill, and later, he attempted to obstruct the investigation by directing the destruction of subpoenaed documents. The United States supports both of the recommendations made by the U.S. Probation Office. As is discussed below and will be presented further in a sentencing

memorandum to the Court, the defendant's crime of diverting funds to tribal insider Myron Ellis was carried out to prevent Ellis' political opposition to, and any public scrutiny of, the tribal "self insurance" plan created by defendant Finn.

I. BRIEF STATEMENT OF FACTS

Taken out of context, it might appear that the defendant did not personally profit from his use of fictitious invoices to divert tribal funds to co-defendant Myron Ellis. However, the defendant's greater overall culpability is revealed by placing the false invoice/kickback scheme in its larger context. Viewed against a broader landscape which encompasses the defendant's unconscionable personal profit from the tribal self-insurance plan, it becomes clear that the defendant's fraudulent "kickback" of money to Ellis was definitely in Finn's own best interest.

RRM was a corporation that was created in 1985 by the tribal government of the Leech Lake Band upon the advice of its attorney, the defendant, Harold "Skip" Finn. The stated purpose of RRM, according to the public resolutions that were passed by the Leech Lake Reservation Business Committee ("LLRBC"), was to administer a "self insurance" plan that the LLRBC intended as a means of controlling their rising insurance costs. (See Exhibit 1, LLRBC Res. No. 86-26). However, instead of saving the Leech Lake Band on its insurance costs as was promised, the principal effect of the RRM "self insurance" plan was an unconscionable, risk free financial windfall for the owners of RRM.

It is not surprising that the LLRBC was taken advantage of in the RRM transaction since the principal owner of RRM was the person who was supposed to look out for the interests of the Leech Lake Band, their own lawyer, "Skip" Finn. The defendant's own conflict of interest was compounded when he coopted the independent judgment of other influential officials

of the Leech Lake Band by either giving them an ownership interest in RRM or otherwise letting them personally benefit from the RRM transaction. Those officials included former Chairman Dan Brown, current Chairman Alfred "Tig" Pemberton, and Executive Director and LLRBC member Myron Ellis. The conflict of interest on the part of the defendant Finn was not academic or theoretical. The real result of this conflict was an incredibly one-sided set of agreements that wholly favored RRM and its owners and unquestionably damaged the people of the Leech Lake Band.

The RRM transaction was promoted by the defendant Finn as a "modified self insurance" plan. In reality, the RRM transaction was neither true insurance nor true self insurance. Under a true insurance contract, the Leech Lake Band would have been required to pay premiums but it would have been actually covered for any claims up to the promised coverage limit. Under a true self insurance contract, the Leech Lake Band would have been exposed to risk and have to itself cover any property or liability losses it suffered. However, under a true self insurance contract the Leech Lake Band would also have saved money by not having to pay any premiums. Under the RRM contracts, the Leech Lake Band paid substantial premiums but did not receive anywhere near the coverage it was promised.

In terms of reasonable compensation, a provider of true insurance is entitled to a premium because it is incurring risk and if a valid claim is presented, it must pay the claim from its own funds up to the coverage limit. An administrator of a true self insurance plan incurs no risk and is usually compensated only for their administrative work. The compensation a third party administrator ("TPA") is paid by the self-insuring entity is generally only a small percentage of the claims filed and processed. Since the administrator of a self insurance plan bears no risk, the compensation should not include any

"premium" or in any way be dependent on the risk taken by the self-insuring entity.

Under the RRM contracts, the Leech Lake Band received an "insurance contract" which promised them $8.6 million of property coverage and $300,000 CSL in general liability coverage. (See Exhibit 2, "Custom Insurance Policy," p. 2). In reality, RRM had no assets and could not pay any claims. Other than the premium payments from the Leech Lake Band, the only arguable source of funds for RRM to meet the $8.6 million coverage limit was a "pledge" by Finn and his law partner Kimball Mattson that they personally possessed $450,000 of "liquid assets" with which to pay claims. (See Exhibit 4, "Debenture Agreement"). In fact, the "pledge" of even that small amount did not require either Finn or Mattson to place any assets in escrow or even identify the assets that they claimed to possess. Moreover, the "pledge" was largely illusory since it was freely and unilaterally revocable by Finn and Mattson. (See Exhibit 4, p. 2). Also, a bank loan application that was completed by defendant Finn shortly after the pledge revealed that he did not have even $30,000 of the net "liquid assets" he had pledged to RRM.[1]

Clearly, RRM was incapable of providing any true insurance coverage to the Leech Lake Band as it had promised in the Insurance Agreement. A funds flow projection prepared by the defendant himself revealed that, even though it had promised $8.6 million in coverage, RRM would not reach even $1 million in reserves until it had received 5 years of premium payments from the LLRBC and even that projection

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[1] Because the $450,000 pledge of assets was freely revocable by Finn, he really incurred no risk. However, he did receive substantial compensation for his "pledge." Under the RRM agreements, Finn and Mattson, by reason of their "pledge" of assets, were to receive 15% of the total annual premium, or $45,000 for the year 1985-86 and $60,000 annually for each of the years 1986-90. (See Exhibit 4, p. 1).

assumed that there would be no significant claims against RRM during those five (5) years. (See Exhibit 5, attached).

Even if RRM had possessed or had available to it the funds necessary to provide the promised $8.6 million of coverage, the agreements that were drafted by defendant Finn had already subtly passed the true risk of any losses back to his client, the Leech Lake Band. The January 14, 1986 "Shareholders' Agreement" shifted the risk of losses from RRM back to the Leech Lake Band by requiring, in the event of any claim in excess of $450,000, that the Leech Lake Band borrow the necessary money for RRM to pay the claim against the LLRBC. (See Exhibit 6, "Shareholders Agreement" para. 3(c)). Thus, if a $5 million piece of Leech Lake Band property was destroyed by a fire, the RRM agreements would require the Leech Lake Band itself to borrow $5 million for its insurance company, RRM, so that its insurance company, RRM, could pay on the claim. Another alternative under the agreements drafted by the defendant was that RRM could force the Leech Lake Band to itself pay any claims against it and RRM could then pay back the Leech Lake Band "over time."

The fact that the RRM agreements shifted all of the risk of any losses to the Leech Lake Band would not be so unconscionable if RRM was not compensated as though it had incurred risk. Yet, without incurring any risk, Finn required the Leech Lake Band to pay RRM hundreds of thousands of dollars of "premiums" every year. Neither would it be unusual for a self-insuring entity such as the Leech Lake Band to pay substantial amounts of money into a fund from which it would pay any future claims. But under a true self insurance plan, the Leech Lake Band would still own the money it had set aside to pay future claims. The money paid by the Leech Lake Band to RRM no longer belonged to the Leech Lake Band. They were premium payments made to RRM as though RRM had incurred some risk for any losses.

The original agreements contemplated that the Leech Lake Band would own at least 25% of RRM and be entitled to at least that portion of the premiums it had paid.[2] However, the agreements drafted by defendant Finn also inexplicably provided that the Leech Lake Band would forfeit any claim to the assets of RRM if the Leech Lake Band terminated the agreement. (See Exhibit 6, "Shareholder's Agreement," para. 1(f)). Thus, the Leech Lake Band was not entitled to recover any of the money it had contributed to its own "self insurance" plan. The agreements drafted by the defendant provided that all of the money would be retained by the other owners of RRM including "Skip" Finn who himself never invested any money in RRM.[3]

The defendant was able to get the RRM "self insurance" plan approved and implemented by the LLRBC for two reasons. First, the defendant was the LLRBC's own attorney who would have otherwise been responsible for scrutinizing the contracts and advising the elected members of the LLRBC about the unconscionable and one-sided nature of the contracts. Second, the defendant headed off any close scrutiny and criticism of the RRM transaction by allowing certain high level LLRBC officials to share in the profits from RRM. The defendant let LLRBC members Dan Brown and Alfred "Tig" Pemberton become part owners of RRM. As Executive Director, and later an elected Representative, Myron Ellis was also an important tribal official whose

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[2] In reality, although certain members of the LLRBC personally owned shares of RRM, the Leech Lake Band itself did not receive any ownership share of RRM.

[3] Upon liquidation of RRM in 1990, the Leech Lake Band did have refunded to it some of its premium payments. However, the Leech Lake Band received less than 22% of the nearly million dollars in cash that was on hand at RRM's liquidation in July 1990. The remaining cash was divided among the individual owners of RRM; "Skip" Finn, Kimball Mattson, Alfred "Tig" Pemberton and Dan Brown.

opposition to RRM could have hurt the defendant's economic interests.

Initially, Ellis was treated by Finn and RRM to complementary country club memberships and smaller "perks." Ellis later expressed interest in investing in RRM himself but was denied that opportunity. Although Ellis was denied an ownership interest, the defendant did funnel money to Ellis through the fraudulent invoice/"kickback" scheme in April and August of 1988 which netted Myron Ellis $13,345. The defendant's RRM "self insurance" transaction then continued without any opposition from Pemberton, Brown or Ellis.

In fact, the only thing that derailed the RRM transaction was a memorandum circulated by the U.S. Department of Interior warning that it would soon be investigating all such insurance contracts.[4] Following that memorandum, and before any investigation could commence, Finn, Pemberton and Brown liquidated RRM and Finn kept for himself hundreds of thousands of dollars that the LLRBC had been paying to RRM for "self insurance."

II. ABUSE OF POSITION OF TRUST

The presentence report concludes that the defendant's guidelines offense level should be increased two levels because the defendant abused a position of trust and that abuse significantly facilitated the commission or concealment of the offense. Specifically, the presentence report concludes that

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[4] In fact, the U.S. Department of Interior had previously examined the question of whether RRM needed to be a licensed insurance carrier (it was not). Eventually, the Department of Interior decided that RRM did not need to be licensed by the State and approved the contract. However, throughout the period of time of the RRM contracts, the LLRBC concealed from both government and private auditors the true nature of the contracts and the inherent conflicts of interest by the tribal insiders. (See Exhibit 7, Letter to Henry E. Moller, CPA, para. 2).

the defendant's position as attorney for the Leech Lake Band facilitated both his creation of the RRM self insurance plan and his ability to get it approved by the Leech Lake Band tribal government. Alternatively, the presentence report concludes that the defendant abused his position of trust as President of RRM by using that position to divert tribal funds to co-defendant Myron Ellis.

U.S. Sentencing Guideline Section 3B1.3 provides for an increase of two (2) levels in the adjusted offense level "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense..." The Application Notes to § 3B1.3 provide further that "public or private trust" refers to a position of trust characterized by professional or managerial discretion. Note 1 suggests that persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. Of particular relevance to this case, the Note specifically states that the adjustment "would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian..." Finally, in assessing whether the defendant used a "special skill," Application Note 2 defines it as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts."

As identified in the presentence report and outlined in the facts above, the defendant's position as attorney for the Leech Lake Band and administrator of the self insurance plan was integral to the fictitious invoice/"kickback" scheme. Ultimately, the defendant carried out the false invoice scheme to protect and conceal his conflict of interest on RRM. First, the defendant's position of trust as tribal attorney was critical in gaining approval of the "insurance" contracts between his

company, RRM, and his client, the Leech Lake Band. The defendant admitted his conflict of interest at the time but has argued that he informed Mr. Alfred "Tig" Pemberton, a member of the LLRBC, that the Leech Lake Band might want to seek independent legal advice. However, that warning was wholly ineffective because, as a co-owner of RRM, Mr. Pemberton's interests were actually aligned with the defendant's interests.

In any event, the defendant was not relieved of his ethical obligations toward his client, the Leech Lake Band, by merely warning them that they might want to seek independent legal advice. In 1985, as an attorney licensed to practice in the State of Minnesota, the defendant had an affirmative duty under the Rules of Professional Responsibility to refrain from entering into business transactions with a client that are not fair and reasonable to the client and fully disclosed in writing in a manner which can be reasonably understood by the client. (See Exhibit 8, Minn. Rules of Professional Responsibility, Rule 1.8).

Stripped to its bare terms, the RRM "self insurance" agreements proposed by the defendant to his own client required the Leech Lake Band to pay RRM $300,000 - $400,000 each year in "premiums." In exchange, RRM appeared to promise $8.6 million of property coverage of tribal buildings. RRM never had the assets necessary to pay the stated coverage limit of $8.6 million, and the defendant himself projected that RRM would not reach even $1 million in assets for five years. Finally, the RRM agreements drafted by the defendant had shifted the risk of any losses back to the Leech Lake Band.

In one of the most unreasonable provisions, the RRM contracts drafted by the defendant required his client, the Leech Lake Band, to forfeit any claim to the funds in RRM if the Leech Lake Band terminated the agreements before five (5) years. The defendant characterizes this provision as

necessary to compensate RRM for the "risk" that it incurred in extending coverage to the Leech Lake Band. However, as we have seen, through the agreements drafted by the defendant, RRM had already shifted the risk of any losses back to the Leech Lake Band and RRM actually incurred no risk. Thus, the adoption of the "forfeiture" clause was to the extreme benefit of the defendant and contrary to the best interests of his client, the Leech Lake Band.

Unquestionably, the RRM "insurance" contracts entered into by the defendant with his client were not fair and reasonable to his client. The contracts were in fact so contrary to the interests of the defendant's client that they are unconscionable. Nor were the true terms of the transaction disclosed to the client in a manner that could be reasonably understood by the client. As such, the defendant's conduct violated Rule 1.8 of the Minnesota Rules of Professional Conduct. The defendant's apparent violation of the state bar regulations on conflicts of interest strongly supports the recommendation of the U.S. Probation Office.

In addition to being the attorney for the victim of the offense, the defendant occupied and abused another position of trust with respect to the subject offense. As President of RRM, a tribal organization, the defendant was responsible for administering all aspects of the Leech Lake Band's insurance program. The defendant's duties included handling all claims against the Leech Lake Band and collecting insurance "premiums" from the Leech Lake Band as well as other administrative expenses. The defendant carried out this task by submitting periodic invoices to the Leech Lake Band. The defendant also was responsible for managing the funds of RRM. The defendant exploited his position of trust and exclusive control over RRM operations by creating and submitting to the Leech Lake Band two fictitious invoices for services that were not in fact rendered. The defendant also exploited his position of trust and exclusive control over RRM

funds by taking funds paid by the Leech Lake Band for insurance services and using them to pay a "kickback" to co-defendant Myron Ellis.

If the RRM contracts are viewed as a true self insurance contract in which the Leech Lake Band was exposed to risk but was setting aside its own funds to pay future claims against it, then the defendant (and RRM) would be considered the third party administrator of the plan and the guardian of the Leech Lake Band's funds. The defendant then not only violated the trust placed in him as an attorney, but he also abused the position of trust he occupied as guardian of the tribal "self insurance" funds by using those funds to pay a "kickback" to Myron Ellis.

III. OBSTRUCTION OF JUSTICE

The presentence report of the U.S. Probation Office also recommends that the defendant's guideline offense level be increased two (2) levels because, after the federal grand jury investigation commenced, the defendant instructed a tribal accountant to destroy a document that had been subpoenaed by the grand jury. The subpoenaed document was the fraudulent April 1988 RRM invoice for $7,600 that the defendant created and submitted to the Leech Lake Band on behalf of RRM for insurance services that were not in fact provided. It was those funds that were secretly "kicked back" by the defendant to Myron Ellis.

After the subpoena was served on the Leech Lake Band in January 1991, tribal accountant Burton Howard was instructed to and did collect the documents sought. After Howard collected the documents, the defendant asked him to come to his office. The defendant first asked Howard about the invoice. Then, in an effort to conceal the crime and obstruct the investigation, the defendant told Burton Howard: "Get rid of it, I don't want to know what you do with it, just

get rid of it. That's the piece of paper that could send us all up the river." Against his own interest, Mr. Howard has now admitted destroying the document at the defendant's instruction. The defendant's directions to Mr. Howard were also witnessed by his co-defendant, Myron Ellis. In corroboration of Mr. Howard and Mr. Ellis, the subpoenaed document (the $7,600 invoice) was never produced by the Leech Lake Band in response to the federal grand jury subpoena nor was a copy of the $7,600 check to RRM that was generated in response to the invoice.

U.S. Sentencing Guideline Section 3C1.1 requires that the defendant's guideline offense be increased two (2) levels "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense..." Section 3C1.1 is intended to apply to a wide range of conduct that could be engaged in to obstruct justice. However, there can be no clearer example of obstruction of justice than the destruction of documents subpoenaed by the federal grand jury. Application Note 3 to that guideline section expressly states that the obstruction of justice enhancement applies to:

> (d) "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence, or attempting to do so..."

The effect of the defendant's obstruction of justice was to greatly delay the United States' efforts in discovering and prosecuting the subject offense. In fact, the five year statute

of limitations on the April 1988 invoice/ "kickback" expired before sufficient evidence of the offense could be collected. The obstruction of justice and the resultant loss of evidence was very nearly successful in preventing any prosecution. The lack of documentary evidence inhibited the United States in effectively questioning and gaining the cooperation of tribal insiders. If the court determines that an evidentiary hearing on this issue is appropriate, the United States is prepared to present evidence and testimony in support of the Probation Office conclusion that the defendant obstructed justice.

Respectfully submitted,

Dated: October 28, 1994

DAVID L. LILLEHAUG
United States Attorney

/S/
BY: MICHAEL W. WARD
Assistant U.S. Attorney
Attorney ID No. 190755

JURY INSTRUCTION NO. 30

The indictment alleges a conspiracy to commit specific crimes. It also alleges a conspiracy to defraud an agency of the United States government. A conspiracy to impede or obstruct the lawful functions of the Department of Interior in its lawful functions is a violation of the conspiracy statute. To prove such a conspiracy, it is not necessary for the government to prove that the defendants committed other crimes. Nor does the government have to prove that it was actually defrauded (lost money) or that the Department of Interior was actually impeded. What the government must demonstrate is that the defendants conspired together with a purpose to impede or obstruct or impair or defeat, the lawful functions of the Department of Interior, and that a co-conspirator committed at least one alleged overt act in furtherance of the conspiracy.

You are instructed that the Department of Interior is an agency of the United States within the meaning of 18 U.S.C. 371.

JURY INSTRUCTION NO. 31

Section 1163 of Title 18 United States Code provides in pertinent part that:

> Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization...shall be guilty of an offense against the laws of the United States.

As used in this section, the term "Indian tribal organization: means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws. To qualify as a corporation, association or group organized under the United States laws relating to Indian affairs, the organization must satisfy two requirements. First, the Leech Lake Band of Chippewa Indians, and not some other group or person, must control the organization either in fact, or through their elected or appointed representatives. Second, the organization must deliberately conform to or comply with federal laws governing Indian affairs.

The Leech Lake Band of the Minnesota Chippewa Tribe is a Band of Indians and a part of a tribe and is a community of Indians which are subject to the laws of the United States relating to Indian affairs.

JURY INSTRUCTION NO. 32

Defendant Finn is charged in counts 2 through 9 and in count 26 with knowingly and intentionally embezzling, stealing, converting to his own use or the use of another, and willfully misapplying and willfully permitting to be misapplied, money, funds, credits, goods, assets and other property belonging to a Indian tribal organization, the Leech Lake Band of Chippewa Indians and its Tribal Corporation. Reservation Risk Management, Inc. in violation of Title 18, United States Code Section 1163. Defendant Pemberton is charged in count 5 with defendant Finn with this same offense. In order to prove the defendants guilty of this offense beyond a reasonable doubt the government must prove:

One: that the defendant embezzled, stole, knowingly converted to his use or the use of others, willfully misapplied, or willfully permitted to be misapplied, moneys, funds, credits, goods, assets, or other property;

Two: that the moneys, funds, credits, goods, assets, or other property belonged to an Indian tribal organization; and

Third: that the defendant did so knowingly and willfully.

If you decide that the defendant is guilty of the alleged conduct, then you must decide whether the government has proved beyond a reasonable doubt that the value of the moneys or property was more than $100.00.

JURY INSTRUCTION NO. 33

To "embezzle" means the wrongful or willful taking of money or property of someone else after the money or property has lawfully come within the possession or control of the person taking it.

To "misapply" denotes conversion of another's money or property to the use of the defendant or a third party.

Conversion may be consummated without any intent to keep and without any wrongful taking where the initial possession by the converter was entirely lawful, and conversion may include misuse or abuse of property, and may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use or purposes.

JURY INSTRUCTION NO. 34

Title 18, United States Code, Section 666, provided in relevant part, that:

(a) Whoever, if the circumstances described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a...Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(I) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency, is guilty of an offense against the United States.

(b) The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

JURY INSTRUCTION N0. 35

Counts 10, 11, 13 and 14 of the indictment charge the defendants with a violations of Section 666 of Title 18, United States Code. In order to prove a defendant guilty, the government must establish beyond a reasonable doubt the following essential elements:

One: that the defendant was an agent of an organization that received in any one year period, benefits in excess of $10,000 under a Federal Program involving a grant, contract, subsidy, loan guarantee, insurance or other form of Federal assistance;

Two: that the defendant embezzled, stole, obtained by fraud, or otherwise without authority knowingly converted to the use of any person other than the rightful owner or intentionally misapplied, property valued at $5,000 or more; and

Three: that the property taken was owned by, or was under the care, custody, or control of such organization.

JURY INSTRUCTION NO. 36

It is not necessary for the government to prove that the funds or property actually taken were federal money or traceable to federal money. Rather, any property, regardless of its source, which is embezzled from an organization falls under the statute, so long as the property was under the care or control of the organization and the organization received more than $10,000 per year in federal benefits.

JURY INSTRUCTION NO. 37

As used in these instructions with respect to Counts 10, 11, 13 and 14 of the indictment:

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission for the offense or that ends no later than twelve months after the commission for the offense. Such period may include time both before and after the commission of the offense.

LEECH LAKE RESERVATION
BUSINESS COMMITTEE

ROUTE 2 RBC • CASS LAKE, MINNESOTA 56633

218-335-2207

August 16, 1985

M E M O R A N D U M

TO: Reservation Business Committee Members, Burton Howard, Richard Schulman, Denny Maddox, Program Directors, Division Heads, Management Team, Skip Finn, Bob Goggleye, Alfred Fairbanks, Ken Litzau & Central File

FROM: John McCarthy, Management Team Member

SUBJECT: Self Insurance

Due to the excessive cost of insurance the reservation has made some major changes in our existing insurance policies. As of August 14, 1985 we are starting a self insurance program on various risks. We will be self insuring Fire and extended coverage on all buildings other than the Facility Center, the Veterans Memorial and the Che-We Complex. We will also be self insuring all vehicles other than those carrying mortgages for collusion only. We will still be carrying general liability on these risks until further notice.

In the event you have any claims please contact Richard Schulman at extension 438.

As new information develops we will be in touch with you.

Thank you.

JMc / dm

LEECH LAKE RESERVATION
BUSINESS COMMITTEE
RESOLUTION NO. 86-26

WHEREAS, the cost of insurance for RBC buildings, general liability, machines and automobiles has risen dramatically over the past three years and the spiraling cost of outside insurance purchased on the market are continuing; and

WHEREAS, the Leech Lake Reservation can no longer afford the cost of insurance; and

WHEREAS, the Leech Lake Reservation Business Committee has considered a modified Self Insurance Plan.

BE IT RESOLVED, that a Charter of Incorporation is hereby granted to Reservation Risk Management, Inc. with the attached Articles of Incorporation and By-Laws for the purposes of establishing and operating the Leech Lake Reservation Self Insurance Plan; and

BE IT FURTHER RESOLVED, the Reservation Risk Management, Inc. shall be considered a corporate sub-entity of the Leech Lake Reservation Business Committee; and

BE IT FURTHER RESOLVED, that all previous Resolutions or ordinances of the Leech Lake Reservation Business Committee waiving sovereign immunity for claims covered by insurance are hereby revoked and/or modified to the extent necessary to limit claims and liability to the limits established by the Leech Lake Reservation Self Insurance Plan; and

BE IT FURTHER RESOLVED, that Reservation Risk Management, Inc. shall not have any authority to waive sovereign immunity regarding any matters; and

BE IT FURTHER RESOLVED, that the chairman and Secretary-Treasurer are hereby authorized to execute any and all documents necessary to immediately effectuate the Self Insurance Plan.

* * * * * *

We do hereby certify that the foregoing Resolution was duly adopted by a vote of 4 for and 0 against at a Special meeting of the Leech Lake Reservation Business committee, a quorum being present, held on October 1, 1985 at Cass Lake, Minnesota.

/S/ _____
Hartley White, Chairman

/S/ _____
Alfred Pemberton, Secretary-Treasurer

CHARTER AND ARTICLES OF INCORPORATION OF RESERVATION RISK MANAGEMENT, INC.

Pursuant to the authority granted by Article VI, Section 1(d) of the Constitution of the Minnesota Chippewa Tribe, the Leech Lake Reservation Business Committee does hereby charter a subordinate body politic to manage the Leech Lake Reservation's Self Insurance Plan and engage in other lawful activities.

ARTICLE I

The name of the corporation is Reservation Risk Management, Inc.

ARTICLE II

The existence of the corporation shall be perpetual and the corporation shall have the same immunities to suits and claims as the Leech Lake Band of Chippewa Indians.

ARTICLE III

The principal office of the corporation will be located at Cass Lake, Minnesota.

ARTICLE IV

Purposes

To manage the Self Insurance Plan of the Leech Lake Reservation and engage in other lawful activities.

ARTICLE V

Board of Directors

There shall be a five (5) member Board of Directors selected at the first annual meeting of the shareholders hereof and whose terms of office shall be set according to the By Laws adopted at the first annual meeting.

ARTICLE VI

Meetings and officers

Section 1. The Board of Directors shall meet from time to time as needed but shall meet at least quarterly.

Section 2. The By Laws of the corporation shall be adopted at the first annual meeting of the shareholders hereof. The By Laws shall establish the policies, rules and regulations necessary and appropriate to govern the conduct of business of the corporation.

Article VII

Stock

The corporation shall have authority to issue 1,000 shares of stock. Shares of stock may only be held by the Leech Lake Reservation Business Committee itself and members of the Leech Lake Band of Chippewa Indians.

ARTICLE VIII

The amount of stated capital with which this corporation will begin business is One Thousand Dollars ($1,000.00).

ARTICLE IX

Section 1. The Leech Lake Reservation Business Committee and the Leech Lake Band of Chippewa Indians and the Minnesota Chippewa Tribe shall not be liable for any obligations of the corporation except insofar as they may obligate themselves in writing.

Section 2. The corporation may sue or be sued but this provision shall in no way be deemed a waiver of any sovereign immunity accorded to this corporation and further providing that such suit must be brought in the Leech Lake Reservation Tribal Court or other forum which may be designated by the Leech Lake Reservation Business Committee.

ARTICLE X

Amendments

These Articles may be amended by a three-fifths (3/5) vote of the Board of Directors at any regular meeting.

IN WITNESS WHEREOF, we have hereunto set our hands this 1st day of October, 1985.

LEECH LAKE RESERVATION
BUSINESS COMMITTEE

/S/ _____
By Hartley White, Chairman

/S/ _____
By Alfred Pemberton, Secretary-
Treasurer

This Charter and Articles of Incorporation of Reservation Risk Management, Inc. are hereby granted on this 1st day of October, 1985 pursuant to action of the Leech Lake Reservation Business Committee taken on the same date.

/S/_____
By Hartley White, Chairman

/S/_____
By Alfred Pemberton, Secretary-Treasurer

PRE-ORGANIZATION SUBSCRIPTION AGREEMENT
OF
RESERVATION RISK MANAGEMENT, INC.

The undersigned, in consideration of the subscription of each other, hereby severally subscribe to the shares of the corporation to be formed in accordance with the laws of the Minnesota Chippewa Tribe under the name of Reservation Risk Management, Inc. with a proposed authority to issue 1,000 shares of the par value of $250.00 per share.

We agree to purchase the number of shares of stock and pay therefore the amount of money set opposite our respective signatures. All subscriptions shall become due and payable at such time or times as the Board of Directors may determine.

This subscription shall not be binding on the undersigned, until and unless subscriptions amount in the aggregate of at least Two Hundred Fifty Thousand Dollars ($250,000.00) by or before the 1st day of October, 1985.

Date	Name and Address	No. of Shares	Amount Subscribed	Date of Payment
11/5/85	s/Alfred R. Pemberton	–	–	–
2-6	s/Hartley White	250	$ 62,500.00	
11/5/85	s/Harold R. Finn	750	$187,500.00	

SHAREHOLDERS' AGREEMENT BETWEEN THE LEECH LAKE RESERVATION BUSINESS COMMITTEE AND HAROLD R. FINN FOR RESERVATION RISK MANAGEMENT, INC.

THIS AGREEMENT, entered this 14th day of January, 1986, by and between the Leech Lake Reservation Business Committee (RBC) and Harold R. Finn (HRF) constitutes our sole agreement regarding operation of the entity identified as Reservation Risk Management, Inc. (RRM):

1. The subscription agreement for Reservation Risk Management, Inc., attached hereto as Attachment "A" and dated November 5, 1985 is incorporated herein by reference.

2. a) The parties hereto agree that the insurance agreement between RRM and RBC can be voided at any time by mutual consent of the parties hereto.

b) If any shareholder other than the RBC wishes to withdraw from this Agreement, the RBC shall have the first option to purchase those shares. The price of the shares shall be equal to their proportional ownership of Fund C as it exists at that time. If the RBC does not exercise its option to purchase those shares within 30 days after receiving notice that those shares are available, that shareholder shall be entitled to receive the determined price from RRM upon a payment schedule mutually agreed upon.

c) A shareholder may transfer his shares to other persons, for value or otherwise, without first offering those to the RBC so long as there is no intention to avoid this Agreement. Such other shareholders shall then be bound to the terms of this Agreement.

d) Upon death of a shareholder RRM shall be obligated to redeem those shares at a price equal to the proportionate ownership of Fund C as it exists at the date of death.

e) Any shareholder can, at any time, negotiate a sale/transfer of their shares to the RBC.

f) If RBC withdraws from this Agreement or its insurance agreement with RRM at any time prior to October 31, 1990, RBC shall forfeit any claim to any assets of RRM and the corporation shall be immediately dissolved and distributed amongst the other shareholders.

3. The insurance premiums paid by RBC under its insurance agreement with RRM will be handled as follows:

a) Fifteen percent (15%) of each premium shall be deposited in Fund A. The balance thereof shall be deposited in Fund B. Fund B will be utilized for operating costs of RRM. On at least a quarterly basis excess funds shall be transferred from Fund B to Fund C. Fund C shall be the reserve fund for the insurance afforded to RBC.

b) Claim reserves in Fund C shall be established at $1,000,000.00 for property/casualty insurance and $500,000.00 for liability insurance. The reserve for property/casualty insurance shall be maintained at $1,000,000.00 or ten percent (10%) of property coverage extended, whichever amount is greater. The reserves in Fund C shall belong to the shareholders of RRM and cannot be distributed unless the parties mutually agree to modification of this Agreement or dissolution of RRM.

c) If Fund C is exhausted then any amounts being held in Fund A shall provide the next source for payment of claims. If both Fund A and Fund C are exhausted, RRM shall then call upon the debenture holders for funds in increments of $1,000.00. If the $450,000.00 provided by the debenture holders is not sufficient to satisfy outstanding claims, the RBC agrees to cooperate with RRM to the extent necessary to obtain loans and/or grants to cover outstanding losses and further agrees to consider

acceptance of payment for valid claims over a period of time.

d) Fund A shall be solely owned by RRM. At the end of each fiscal year, however, amounts accrued in Fund A shall be payable to debenture holders in proportion to their obligations to RRM. The debenture holders shall be obligated to provide up to $450,000.00 in increments of $1,000.00 as required by RRM. The debenture agreements shall further provide that the provision of these funds is dependent upon depletion of Fund C only and is not contingent upon any other matter whatsoever. The debenture holders shall provide promissory notes, mortgages or other security deemed reasonable to ensure prompt payment to RRM when needed.

WHEREFORE, we have hereunto set our hands on the date first above written.

/S/
Hartley White, Chairman,
Leech Lake Reservation
Business Committee

/S/
Harold R. Finn, Shareholder

/S/
Alfred R. Pemberton, Secretary/
Treasurer, Leech Lake Reservation
Business Committee

RESERVATION RISK MANAGEMENT, INC.
INSURANCE AGREEMENT WITH
LEECH LAKE RESERVATION
BUSINESS COMMITTEE

THIS AGREEMENT, entered this 14th day of January, 1986, by and between the Leech Lake Reservation Business Committee and Reservation Risk Management, Inc., constitutes the sole agreement between the parties hereto:

1. In exchange for the insurance coverages outlined in the insurance contract attached hereto, the Leech Lake Reservation Business Committee agrees to maintain this insurance agreement for a period of at least ten (10) years from the date hereof and shall pay to Reservation Risk Management, Inc. the following annual premiums:

   a. For the period commencing October 1, 1985 through September 30, 1986 the sum of $300,000.00;

   b. For the period commencing October 1, 1986 through September 30, 1990 the sum of $400,000.00 annually;

   c. For the period commencing October 1, 1990 and ending September 30, 1995 the sum of $450,000.00 annually.

2. The annual deposits outlined above shall never be less than that agreed upon herein. However, should experience indicate that additional revenues are necessary to cover losses associated herewith the Leech Lake Reservation Business Committee agrees to pay an additional annual surcharge as deemed reasonablly necessary by the Board of Directors of Reservation Risk Management, Inc.

3. If additional property and liability coverage is added to this policy, the Leech Lake Reservation Business Committee agrees to pay a reasonable premium for this

additional coverage above and beyond those premium payments outlined in the first paragraph hereof.

4. Reservation Risk Management, Inc. agrees to seat as full voting directors of its Board of Directors two persons nominated by the Leech Lake Reservation Business Committee. The Board of Directors of Reservation Risk Management, Inc. shall be comprised of five persons.

5. Reservation Risk Management, Inc. shall be obligated to advise and assist the staff of the Leech Lake Reservation Business Committee in developing a formula for fairly assessing the above-defined premiums to the various programs and subordinate entities of the Leech Lake Reservation Business Committee. Reservation Risk Management, Inc. shall also apply its best efforts in the management of the insurance plan hereby provided. In addition, Reservation Risk Management, Inc. shall provide a full range of risk management services to the Leech Lake Reservation. These services shall include soliciting and securing additional insurance as deemed necessary by the Reservation Business Committee. The cost of these additional coverages shall be above and beyond those outlined herein.

6. This Agreement may be terminated by the Leech Lake Reservation Business Committee provided at least thirty (30) days' advance written notice is provided. The Reservation Business Committee shall be obligated to pay a proportionate share of the annual premium outlined above should termination occur at any time other than the annual anniversary date hereof. The insurance protections hereby afforded shall automatically and immediately terminate if the Leech Lake Reservation Business Committee fails to make its premium payments as required per the attached schedule. Reservation Risk Management, Inc. agrees that it shall not terminate this Agreement for any reason whatsoever as long as the Leech Lake Reservation Business Committee makes its premium payments as outlined above.

WHEREFORE, we have hereunto set our hands on the date first above written.

LEECH LAKE RESERVATION BUSINESS COMMITTEE	RESERVATION RISK MANAGEMENT, INC.
/S/	/S/
By Hartley White, Chairman	By Harold R. Finn, President
/S/	
By Alfred Pemberton, Secretary-Treasurer	

Miller, McDonald, Erickson & Moller, Ltd.
CERTIFIED PUBLIC ACCOUNTANTS
MEMBER, AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS
513 BELTRAMI AVENUE, P.O. BOX 485
BEMIDJI, MINNESOTA 58601
(218) 751-6300

BERNARD A. MILLER, C.P.A.
KENNETH A. MCDONALD, C.P.A.
JOHN E. ERICKSON, C.P.A.
HENRY E. MOLLER, C.P.A.
BRYAN WESTERMAN, C.P.A.

OTHER OFFICES:
PARK RAPIDS, MN
INTERNATIONAL FALLS, MN

January 11, 1989

Leech Lake Reservation Business Committee
Route 3, Box 100
Cass Lake, Minnesota 56633

To Leech Lake Reservation Business Committee Officials and Officers:

This letter explains our understanding of the relationship between Reservation Risk Management and the Leech Lake Reservation Business Committee. This understanding is necessary because of auditing requirements imposed on CPA's to determine if there are any related party relationships between the audited entity and various third parties. If it is determined that a related party relationship exists, this fact is to be commented on in the audit report. The reason for this reporting requirement is that by reporting all related party relationships a reader of the financial statements will have a clearer picture of how the related party relationships reflect on the audited figures.

1. The relationship between RRM and the RBC with regard to workers' compensation insurance is that of a custodial relationship. That is, the workers' compensation insurance of Leech Lake Reservation is a self-funded plan. RRM is only acting as a custodian or investment administrator with regard to the workers' compensation premiums paid to RRM by Leech Lake.
2. The general liability insurance (both property and bodily injury) is purchased from RRM All prior Leech lake Tribal council resolutions establishing some type of control over RRM by the Leech Lake RBC have been rescinded. There are no RBC elected officials who exercise control or who share in the profits of RRM.
3. The premium rates charged for workers' compensation and for the general liability (bodily injury) are insurance competitive rates.
4. No property insurance premiums are charged to any grant program.

Leech Lake Reservation Business Committee

If you agree with our understanding of the relationship between Reservation Risk Management and the Leech Lake Reservation Business Committee as described in this letter, please sign the enclosed copy and return it to us.

Very truly yours,

By /S/_____
Henry E. Moller,
Certified Public Accountant

LEECH LAKE RESERVATION BUSINESS COMMITTEE

Daniel Brown, Chairman	/S/ Signature	4-24-89 Date
Alfred Pemberton, Secretary, Treasurer	/S/ Signature	5/3/89 Date
Myron Ellis, District III Representative	/S/ Signature	5-3-89 Date
Gladys Drouillard, District II Representative	/S/ Signature	5-4-89 Date
James Michaud, District Representative	/S/ Signature	5-3-89 Date
Richard Robinson, Jr. Executive Director	/S/ Signature	5-4-89 Date
Burton Howard, Controller	/S/ Signature	5-3-89 Date

LEECH LAKE RESERVATION BUSINESS COMMITTEE
RESOLUTION NO. 90-72

WHEREAS, the Leech Lake Reservation Business Committee is the duly authorized governing body of the Leech Lake Band of Chippewa Indians and is responsible for administering and protecting all assets, and operations of the Leech Lake Band of Chippewa, Indians, and

WHEREAS, the Leech Lake Reservation Business Committee does desire to retain the services of a professional consultant for management and analysis of insurance needs and programs and for the development of risk management services;

NOW, THEREFORE BE IT RESOLVED, that the Leech Lake Reservation Business Committee does accept the proposal for risk management services offered by Reservation Risk Management, Inc. and the Chairman and Secretary/Treasurer are hereby authorized to execute a contract for said services retroactive to October 1, 1989 and are further directed to take all necessary action to implement said agreement.

WE DO HEREBY CERTIFY, that the foregoing Resolution was duly presented and adopted by a vote of 4 for, and 0 against, at a Special meeting of the LEECH LAKE RESERVATION BUSINESS COMMITTEE, a quorum being

present, held on March 29, 1990, at Minneapolis, Minnesota.

/S/
Daniel Brown, Chairman
LEECH LAKE RESERVATION BUSINESS COMMITTEE

/S/
Alfred R. Pemberton, Secretary/Treasurer
LEECH LAKE RESERVATION BUSINESS COMMITTEE

Funds Flow

	Premium	Debentures /guar.	Operation	Reserves
Year 1:	$300,000	45,000	100,000	155,000
Year 2:	$400,000	60,000	100,000	240,000/395,000
Year 3:	400,000	60,000	100,000	240,000/635,000
Year 4:	400,000	60,000	100,000	240,000/875,000
5:	400,000	60,000	100,000	240,000/1,115,000
6.	450,000	67,500	100,000	282,500/1,397,500
**** 7.	450,000	67,500	100,000	282,500/1,680,000 *** ($1.5 mil.)

*** Have now reached reserve of $1,500,000. Hopefully savings interest will have covered losses first few years.

*** $180,000 available to rebate or pay out as dividends. Seventy-five (75) percent will be paid to RBC and balance proportionately to any other shareholders.
RBC would get $135,000, other(s) $45,000.

8.	450,000	67,500	100,000	282,500/*****

****If reserve kept at $1.5 mil., then $282,500 to be distributed with $211,875 (75%) to RBC.